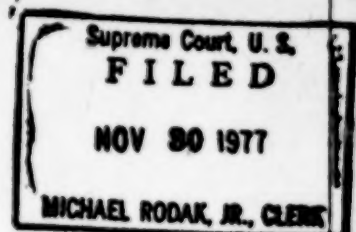


IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 76-6767



FRANK R. SCOTT and BERNIS L. THURMON,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR CHLOE V. DAVIAGE AS AMICUS CURIAE

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BRIEF FOR CHLOE V. DAVIAGE AS AMICUS CURIAE

INTEREST OF CHLOE V. DAVIAGE

On June 24, 1970, a District of Columbia Grand Jury handed down indictments charging amicus Chloe Daviage and petitioners Frank Scott and Bernis Thurmon with violations of federal narcotics laws. For the next seven years, Daviage, as a direct party to the proceedings, vigorously asserted her rights in extensive pre-trial hearings, the trial itself, three decisions of the court of appeals, and two petitions for writ of certiorari. Although this Court granted the joint petition for writ of certiorari filed by Scott and Thurmon (No. 76-6767), it has not acted on Daviage's petition (NO. 76-6637).¹

This Court's review of Scott's and Thurmon's claims involves consideration of the identical court of appeals opinion and judgment to which Daviage was a party below and from which she filed a separate and timely petition for writ of certiorari. Hence, any action the Court takes in the instant case will apply to Daviage, not simply as precedent but because she is a party to the judgment of the court of appeals which this Court will reverse, affirm or vacate.

¹ The legal issues in Scott's and Daviage's cases are identical. The Thurmon case is different only insofar as the Government is not contending that he lacks standing to raising minimization claims.

In a letter to the Clerk of this Court, dated October 14, 1977, counsel for Daviage pointed out that his client was placed in the position of having her case determined solely by the actions of counsel for her co-petitioners. The letter also noted that because this Court had not ruled on Daviage's petition to proceed in forma pauperis, she would be unable to file an amicus curiae brief due to the cost of printing. On October 17, the Clerk telephoned counsel for Daviage and stated that she would not be required to comply with the requirement of Rule 42.5, of the Revised Rules of this Court that an amicus curiae brief be printed.

In a letter dated October 25, 1977, counsel for petitioners Scott and Thurmon consented to Daviage's participation as amicus curiae. In a letter dated November 4, 1977, the Solicitor General gave his consent. Those letters have been filed with the Clerk of this Court.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the District of Columbia Circuit, filed on March 29, 1977, is unreported. The text of the opinion is set forth in the Joint Appendix. No opinion was rendered by the United States District Court for the District of Columbia upon the conviction of the petitioners and the amicus.

Other opinions in this case prior to the conviction of the petitioners and the amicus are as follows: The first opinion of the United States District Court for the District of Columbia, granting the joint motion to suppress evidence, is reported at 311 F.Supp. 233 (D.D.C. 1971). The opinion of the United States Court of Appeals for the District of Columbia Circuit upon the Government's first interlocutory appeal is reported at 504 F.2d 194 (D.C.Cir. 1974). The second opinion of the district court, again granting the renewed suppression motion, is unreported. The text of the opinion is set forth in the Joint Appendix and in the Addendum to this Brief. The opinion of the court of appeals upon the Government's second interlocutory appeal is reported at 516 F.2d 751 (D.C.Cir. 1975). The order of the court of appeals denying a

suggestion for rehearing en banc of the Government's second interlocutory appeal, and the statement of Circuit Judge Robinson are reported at 522 F.2d 1333 (D.C.Cir. 1975). The order of this Court denying the petition for writ of certiorari to review the court of appeals' opinion on the second interlocutory appeal, and the dissenting opinion of Mr. Justice Brennan are reported at 425 U.S. 917 (1976).

JURISDICTION

The Memorandum and Judgment of the Court of Appeals for the District of Columbia Circuit were filed on March 29, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1970).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution - Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code - 18 U.S.C. § 2510(11) (1970)

As used in this chapter -

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

United States Code - 18 U.S.C. § 2515 (1970)

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

United States Code - 18 U.S.C. § 2518(5) (1970)

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept

shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

United States Code - 18 U.S.C. § 2518(10) (a) (1970)

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that --

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

QUESTIONS PRESENTED

1. Do parties to telephone conversations intercepted pursuant to a wiretap order have standing under 18 U.S.C. § 2518(10) (a) to move to suppress the communications seized in deliberate violation of the minimization directives contained in that wiretap order?

2. Did the court of appeals err in concluding that federal narcotics agents, in executing a wiretap, complied with the provision of the intercept order which, pursuant to 18 U.S.C. § 2518(5), required the agents to minimize the interception of non-pertinent conversations, even though the agents conducted round-the-clock surveillance, monitored each and every communication, and admittedly made no good faith effort to comply?

3. Is suppression of the entire intercept and any evidence derived therefrom required because the executing agents totally disregard and flagrantly violated the wiretap order which, pursuant to 18 U.S.C. § 2518(5), directed them to minimize the inter-

ception of non-pertinent conversations?

STATEMENT

Petitioners Frank Scott and Bernis Thurmon, and amicus curiae Chloe Daviage were indicted in the United States District Court for the District of Columbia on June 24, 1970, on four counts of alleged violations of federal narcotics laws. The charges resulted from evidence obtained through the use of wiretap intercepts conducted by the Government, pursuant to 18 U.S.C. § 2518, from January 24 to February 24, 1970.

On April 29, 1971, the district court granted defense motions to suppress all wiretap evidence because of the Government's failure to comply with the requirement, contained in both § 2518 and the Order authorizing the wiretap, that its agents minimize the interception of non-pertinent conversations. The court relied upon testimony to the effect that sixty percent of the conversations did not involve narcotics, and found no evidence that the executing agents made any attempt to comply with the minimization requirement. The court held that to allow continued monitoring when the intercepted communications are clearly non-narcotic related would render the minimization requirements of the statute nugatory and violate the principles of Berger v. New York, 388 U.S. 41 (1967), and Katz v. United States, 389 U.S. 347 (1967). The court also found that the application for an order authorizing the wiretap and the supporting affidavit were sufficient to satisfy the requirements of the statute. United States v. Scott, 331 F. Supp. 233 (D.D.C. 1971).

On May 26, 1971, the Government moved for reconsideration by the district court of its order. It presented an analysis prepared by the United States attorney, fourteen months after the actual surveillance, in which the intercepted calls were categorized and a conclusion presented that only two percent of the calls were unreasonably intercepted. The court denied the motion on June 29, 1971.

The Government filed an interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit on June 23, 1971. On June 27, 1974, the court of appeals issued its

opinion, finding that all the defendants had standing to raise a minimization claim. The court further held, however, that the trial court had applied an improper standard in assessing the merits of the minimization issue, and that the issue must be determined by the standard indicated in its decision in United States v. James, 494 F.2d 1007 (D.C.Cir. 1974). The court of appeals found the record insufficient to apply the James standard, and remanded for further hearing, particularly with regard to the analysis by the United States attorney of the intercepted calls submitted by the Government in support of its motion for reconsideration in the district court in 1971. United States v. Scott, 504 F.2d 194 (D.C.Cir. 1974) (hereinafter referred to as "Scott I").

Hearings on the minimization issue were held in the district court between October 15 and November 8, 1974. The court found, inter alia, that the monitoring agents made no attempt to comply with the minimization provision of the wiretap order, and that the only time the agents even considered minimization occurred when they mistakenly tapped into the wrong line. Based on the admitted failure by the monitoring agents even to attempt compliance, the court again suppressed the wiretap evidence and entered an order to that effect on November 17, 1974. See Joint Appendix, and the Addendum to this Brief.

The Government took a second interlocutory appeal on December 3, 1974. The case was argued before the court of appeals on April 23, 1975. On July 25, 1975, that court rendered its opinion, ruling that even if sixty percent of the calls were non-narcotic related and that the agents made no attempt to minimize the interception of innocent conversations, it could find no instance where the agents' conduct in intercepting conversations was unreasonable. Pursuant to United States v. James, supra, it reversed the lower court's suppression order. The court went on to note that had the district court been correct in its ruling that the minimization requirement had been breached, total suppression of the evidence would not appear to be the proper remedy, and suggested that only conversations which were non-narcotic related be suppressed. United States v. Scott, 516 F.2d 751 (D.C.

Cir. 1975) (hereinafter referred to as "Scott II").

On August 8, 1975, Scott, Thurmon, and Daviage petitioned the court of appeals for a rehearing en banc. On October 3, 1975, the court of appeals denied the request, four judges dissenting. United States v. Scott, 522 F.2d 1333 (D.C. Cir. 1975).

On November 3, 1975 Scott, Thurmon, and Daviage petitioned the Supreme Court for a writ of certiorari. On April 5, the petition was denied with three justices dissenting. Scott v. United States, 425 U.S. 917 (1976).

The case was then remanded for trial, pursuant to Scott II. On July 6, 1976, motions on behalf of all defendants for dismissal of the indictments on speedy trial grounds were denied. On July 15, 1976, Scott, Thurmon, and Daviage were tried on a stipulation of facts and all were found guilty of violating one or more provisions of the federal narcotics laws. Scott and Thurmon were each sentenced to ten years' imprisonment. The trial court, noting that Daviage's participation in the offenses was only peripheral,² sentenced her to three years' imprisonment, suspending all but six months.

The defendants filed notices of appeal to the court of appeals, in which they claimed that they were denied the constitutional right to a speedy trial. They also preserved for review in this Court the minimization issue.

The case was argued on March 21, 1977. On March 29, 1977 the court of appeals filed a memorandum opinion denying all of the contentions.

On April 22, 1977, Daviage petitioned this Court for a writ of certiorari. On May 19, Scott and Thurmon filed a joint petition for writ of certiorari. Both petitions raised the minimization and speedy trial issues. On October 11, 1977, Scott's and Thurmon's petition was granted, limited to the statutory minimization issue. The Court further directed the parties to brief and argue the question of standing. 46 U.S.L.W. 3238 (1977). Daviage's petition is still pending.

² Daviage was found guilty only of one count of using a telephone to facilitate the purchase of narcotics.

SUMMARY OF ARGUMENT

I. Standing of the parties in this case to raise the minimization claim is conferred by the plain meaning of the statute in that a party to an intercepted communication is an "aggrieved person" and, as such, is entitled to invoke the suppression sanction of 18 U.S.C. § 2515. The fact that Scott and Daviage, were not subscribers to the tapped telephone is irrelevant. Although the intercepted calls in which Scott and Daviage participated were exclusively inculpatory, this fact also makes no difference in determining standing. To the extent that the nature of the intercepted calls is relevant at all, that factor only serves as one kind of evidence in demonstrating a failure to minimize. Moreover, such a construction requires no expansion of the current law of standing. Recent case law reflects this Court's concern with protecting privacy rights and insuring that those who fall victim to official intrusion can seek redress.

II. Although this Court has not yet given workable criteria to the minimization requirement, a discernible standard has developed in the federal courts. This standard requires that, to satisfy the directive of 18 U.S.C. § 2518(5), (1) the agents must make good faith attempts to minimize the interception of nonpertinent conversations, and (2) the attempts to minimize must be reasonable. This two-prong standard, widely adopted by the courts, implements the approach of the drafters of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 in balancing the competing values of law enforcement and privacy. It further seeks to mitigate the problems of hindsight evaluations of reasonableness. The record in this case manifests the flagrant violation and purposeful disregard of the minimization requirement by the agents who conducted the surveillance. The admitted failure even to attempt to minimize precludes a finding of compliance with § 2518(5), and requires reversal of the case. However, should this Court find the good faith test inapplicable and seek to determine whether the actual minimization accomplished was reasonable, it is equally clear that, under the circumstances, 100% interception was unreasonable. Given the relatively small

scope of the criminal enterprise, the residential nature of the tapped telephone, the development of patterns of unrelated communications, and the inadequate judicial supervision, a substantial degree of minimization was required. Absent even the attempt at minimization, § 2518(5) was clearly violated.

III. Should this Court determine that the Government violated the minimization requirement, the appropriate remedy is suppression of the entire intercept. The statutory suppression remedy provided for in § 2515 directs a court to suppress intercepted communications and any evidence derived therefrom where the interception was not made in conformity with the order of authorization or approval. Confining suppression to those calls which fall outside the scope of the warrant, as the Government seems to suggest, is essentially no remedy since, unlike a traditional search, the improper items (i.e. conversations) seized will be innocent or at least irrelevant to the criminal matter which is the subject of the wiretap. To suppress only non-pertinent communications is to discredit the centrally important function of § 2518(5), which is to insure that electronic surveillance is conducted pursuant to the directives of Berger and Katz.

Whether the remedy of exclusion of evidence taken in violation of minimization requirements is confined to cases where no good faith efforts were taken to implement any plan for minimization, or whether the remedy may be applied more broadly to cases where the violation is the failure to take adequate steps to minimize, exclusion is required in this case because the monitoring agents totally and deliberately disregarded the minimization requirement.

I. DAVIAGE AND SCOTT, AS PARTIES TO INTERCEPTED TELEPHONE CALLS, HAVE STANDING TO MOVE TO SUPPRESS COMMUNICATIONS SEIZED IN VIOLATION OF THE WIRETAP ORDER.

Daviage and Scott have standing to request suppression of the wiretap evidence in the instant case. The plain language of Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. §§ 2510-2520 (1970), (hereinafter referred to as "Title III"), and the relevant decisions of this Court and other federal courts support this position. Their position is grounded on the fact that 1) they were parties to intercepted conversations, and 2) the agents executing the wiretap did not adhere to the minimization requirement contained in the wiretap order.³ According to the terms of Title III itself, these two factors trigger the standing provisions outlined in the statute.

Section 2518(10)(a) of Title III sets forth the statutory requirements for standing to request suppression. It states in pertinent part:

Any aggrieved person in any trial...may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that - -

(iii) the interception was not made in conformity with the order of authorization or approval.⁴

An "aggrieved person" is defined in § 2510(11) as

a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

3.

Section 2518(5) states, in pertinent part:

Every order and extension thereof shall contain a provision that the authorization to intercept shall be...conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter....

4.

The entire text of § 2518(10)(a) is set forth, supra, at p.4.

In the instant case, Daviage and Scott were parties to intercepted telephone communications; indeed, the wiretaps were the sole evidence against them. Upon hearing the initial motions to suppress, the trial court rejected the Government's contention that they lacked standing to raise the minimization issue. See United States v. Scott, 331 F.Supp. 233 (D.D.C. 1971).⁵ At the first interlocutory appeal, the Government pressed its standing argument. See Scott I, 504 F.2d 194 (D.C.Cir. 1974). The court of appeals, resting its decision entirely upon the plain language of §§ 2510(11) and 2518(10)(a), correctly rejected the Government's claim, ruling that all of the defendants satisfied the requirements as stated in Title III:

There appears to be no question that each of the appellees in this case is an "aggrieved person" within the meaning of the statute. As such, each is protected by the stringent safeguards of Title III, including the requirement that agents minimize interceptions of conversations that they are not authorized to intercept. Each aggrieved person is entitled to question whether the statutory minimization requirement has been satisfied and, on proving that it has not, to move to suppress a communication on the ground that "the interception was not made in conformity with the order or approval." 18 U.S.C. § 2518(10)(a)(iii). 504 F.2d at 197 (footnote omitted).

It is not disputed that Scott, Thurmon, and Daviage were parties to intercepted telephone communications. Yet despite the unequivocal language of § 2518(10)(a), conferring upon such persons the right to move for suppression of the interceptions that did not conform to the wiretap order, the Government continues to urge that Scott and Daviage lack standing.⁶

⁵. Explicit reference to the trial court's determination that all the defendants had standing to raise the minimization issue is found in the first court of appeals decision. Scott I, 504 F.2d 194 (D.C.Cir. 1974). In that opinion, the court stated in reference to the standing issue:

Although the opinion does not so indicate, the transcript of the hearings reveals that the Government unsuccessfully pressed this argument upon the District Court. Id. at 197 n.6.

⁶. The Government bases its argument on the notion that, since the intercepted calls in which Daviage and Scott participated were related to the purpose of the wiretap, they were not injured. See Scott I, 504 F.2d at 197; Brief for the United States in Opposition to the Petitions For Writ of Certiorari, Scott, et al. v. United

This Court has previously determined that Title III should be strictly construed to implement the clear language of the statute itself and the underlying congressional intent to limit electronic surveillance. In United States v. Giordano, 416 U.S. 505 (1974); the Court interpreted § 2516(1) of Title III. Mr. Justice White, speaking for a unanimous Court, stressed that

Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. 416 U.S. at 315.

Giordano involved the Government's attempt to broaden § 2516(1) to permit the Attorney General to delegate his power to authorize interceptions to his administrative assistant instead of to an authorized Assistant Attorney General. The Court refused to accept an interpretation of § 2516(1) which would not only ease the ability of the Government to seek warrants (thereby violating the Congressional intent behind Title III) but also was clearly not warranted by the plain words of the statute.

In United States v. Kahn, 415 U.S. 143 (1974), the Court construed the language of § 2518(1)(b)(iv) which requires the wiretap applicant to state "the identity of the person, if known, committing the offense and whose communications are to be intercepted." The Kahns unsuccessfully argued that this language should be interpreted to mean the applicant must name all possible people whose communications may be intercepted. 415 U.S. at 152. Mr. Justice Stewart, speaking for the Court, stressed that in resolving the sometimes contrary considerations of law enforcement with the need for individual privacy, it was important to begin with "the precise wording chosen by Congress in enacting Title III." 415 U.S. at 151. The Court held, therefore, that since § 2518(1)(b)(iv) stated two requirements-- identification of the person

(fn.6 cont'd.)

States, in Nos. 76-6637 and 76-6767 (Supreme Court of the United States, Oct. Term, 1977), (hereinafter "Government's Brief in Opposition") at 6-7. Of course, such a contention rests squarely on the nature of the calls "seized" and runs directly counter to established fourth amendment principles. See discussion, infra, at pp. 21-24.

committing the offense and of the person whose conversations were to be intercepted; hence, the government agents were not required to name those whom they did not yet know to be committing the offense.

The message of Giordano and Kahn is clear: the detailed provisions of Title III should be precisely implemented. These cases further suggest that, should interpretation be necessary, any ambiguities should be construed in favor of limiting the government's surveillance authority and showing a high regard for individual privacy. See United States v. Giordano, 416 U.S. at 515.

A finding that Daviage and Scott are aggrieved persons and have standing is also consistent with the general purpose of Title III and fourth amendment standing principles. The legislative history of § 2510(11), itself, is not particularly revealing. The portion of the Senate committee report which amplifies the definition of "aggrieved person", says simply:

This definition defines the class of those who are entitled to invoke the suppression sanction of section 2515 discussed below, through the motion to suppress provided for by section 2518(10)(a), also discussed below. It is intended to reflect existing law. S. Rep. No. 1097, 90th Cong. 2nd Sess. 91, reprinted in 1968 U.S. Code Cong. & Ad. News, at 2179-80. (emphasis supplied).

The legislative history of §§ 2515 and 2518(10)(a), while shedding light on those particular sections, does not add meaning to the definition of "aggrieved person." See S. Rep. No. 1097, supra, 96, 106 reprinted in 1968 U.S. Code Cong. & Ad. News at 2184-85, 2195.⁷

However, an examination of the total legislative history of Title III does reveal that permitting one in Daviage's or Scott's position to raise standing is consonant with the general thrust of Title III to show a high regard for individual privacy. The legislative history establishes that the purpose of Title III is twofold: (1) to protect the privacy of wire and oral communications, and (2) to delineate the precise circumstances under which certain limited interception may be warranted. See S. Rep. No. 1097, 90th

There is nothing in the legislative history of these sections which suggests that persons in the position of Daviage and Scott do not have standing. See United States v. Best, 363 F.Supp. 11, 17 (S.D.Ca. 1973), in which the court held that as long as the defendants moving to suppress wiretap evidence had been parties to some of the interceptions, they had standing.

Cong., 2nd Sess. 66, reprinted in 1968 U.S. Code Cong. & Ad. News, at 2153. The Senate Report also states:

The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. Id. at 67 reprinted in 1968 U.S. Code Cong. & Ad. News at 2154.

Title III is explicitly constructed to protect the privacy interests of individuals from electronic invasion. The policy of protecting privacy is further stated in the commentary accompanying § 2515.⁸ In speaking of this section, the Senate Report states:

The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communication. Id. at 96, reprinted in 1968 U.S. Code Cong. & Ad. News at 2185.

Thus, while Title III seeks to employ limited electronic surveillance against certain kinds of organized crime, at the same time a premium is placed on respect for the privacy interests of the citizenry. The protection of privacy was stressed by the Court in Gelbard v. United States, 408 U.S. 41 (1972). The Court stated that the underlying policy of the wire tapping provisions of Title III is "strictly to limit the employment of those techniques of acquiring information." Id. at 47. In order to implement that policy,

Title III authorizes the interception of private wire and oral communications, but only when law enforcement officials are investigating specified serious crimes and receive prior judicial approval, an approval that may not be given except upon compliance with stringent conditions. Id. at 46.

The policy of limiting electronic surveillance, then, is clear both from the legislative history and from the Court's own interpretation of that history. The question of standing must be analyzed

Section 2515, discussed in detail, infra, at pp. 56-59 the evidentiary sanction by prohibiting the use as evidence of wire or oral communications intercepted in violation of Title III. The full text of § 2515 is set forth supra, at p. 3.

with an awareness that the congressional policy underlying Title III recognizes the obtrusiveness of electronic surveillance. The standing provisions, therefore, were drafted with the understanding that the potential for invasion of privacy was great. So, while not intending to expand existing law, Congress did intend to insure that those persons whose privacy was invaded would be in a position to assert the proper statutory remedy.

An examination of existing fourth amendment standing doctrine, which Title III's standing requirements were meant to reflect,⁹ reveals further support for Daviage's and Scott's position. In Jones v. United States, 362 U.S. 257, (1960), this Court discussed standing under Rule 41(e), Fed. R. Crim. P. Jones discussed the dilemma facing a defendant charged with a crime of which possession is a key element. In such a situation, a defendant admitting his possession for the purpose of establishing standing to move to suppress the item would also necessarily be admitting to one of the key elements of the substantive crime. The Court determined that requiring a defendant to make this Hobson's choice violated the purpose behind Rule 41(e). Mr. Justice Frankfurter, speaking for the Court, said that the search and seizure restrictions were "designed for protection against official invasion of privacy," and that an "aggrieved person" is one who "belongs to the class for whose sake the Constitutional protection is given." 362 U.S. at 261, quoting New York ex rel. Hatch v. Reardon, 204 U.S. 152, 160 (1907). Indeed, as the Court pointed out, the very purpose behind judicial refusal to view evidence gathered in violation of the fourth amendment is to make "effective the protection of privacy." Id. at 261.

The Jones case developed the rule that "anyone legitimately on premises where a search occurs may challenge its legality...."¹⁰ 362 U.S. at 267. This rule sweeps aside subtle distinctions of the common law of property as the basis for determining standing, and

⁹. See the legislative history quoted, supra at pp. 13-14

¹⁰. In Jones, the Court held that the petitioner had standing under 41(e) to raise the legality of a search of an apartment in which he was only occasionally a guest.

indicates the Court's concern with insuring that those whose constitutionally protected privacy rights fall victim to official intrusion can seek redress. Mr. Justice Frankfurter further stated, with specific reference to "aggrieved person" status, that

we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement. Id. at 264.

In Alderman v. United States, 394 U.S. 165 (1969), this Court further elaborated on standing to raise a fourth amendment violation:

In these cases, therefore, any petitioner would be entitled to the suppression of government evidence originating in electronic surveillance violative of his Fourth Amendment right to be free of unreasonable searches and seizures. Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations. Id. at 176 (emphasis supplied).

The Alderman Court explicitly kept its holding within the bounds of fourth amendment standing doctrine. See Id. at 175-76.¹¹ However, by its very terms -- "if the conversation of a petitioner were overheard" -- the Alderman Court makes crystal clear that Daviage and Scott would have had standing under pre-Title III law.¹²

II.

Indeed, the decision refers to the then proposed Title III legislation as support for the notion that either Congress or the state legislatures could expand constitutional standing doctrine, but that the proposed Title III did not do so. Id. at 175 n.9.

12.

In Berger v. New York, 388 U.S. 41 (1967), this Court held that the petitioner had standing to challenge the New York State electronic surveillance statute even though his conversations were only overheard during the bugging of someone else's office. The Berger Court stated:

Since petitioner clearly has standing to challenge the statute, being indisputably affected by it, we need not consider...the standing of petitioner to attack the search and seizure made thereunder. Id. at 55.

Berger was one of the primary opinions used by the drafters in constructing Title III. The narrow proscriptions of both Berger and Katz, 389 U.S. 347 (1967), were explicitly built into Title III:

In the course of the opinion (Berger v. New York), the Court delineated the constitutional criteria that electronic surveillance legislation should contain. Title III was drafted to meet these standards and to conform with Katz v. United States, 389 U.S. 347 (1967). S.Rep. No. 1097, supra, 66, reprinted in 1968 U.S. Code Cong. & Ad. News, at 2153.

The Alderman case, unlike the instant one, involved the surreptitious placement of a "bug". However, the pre-Title III standing rule was no different when the device used to obtain information was a wiretap. This fact was made clear in Katz v. United States, 389 U.S. 347 (1967), where the Court, after noting that the fourth amendment covered electronic interceptions, went on to state that one who uses a telephone

is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication. Id. at 352.

The thrust of Jones, Alderman, and Katz is that standing doctrine is designed to afford persons whose conversations have been overheard a means of challenging the validity of the interceptions. Those cases indicate that "[p]rivate conversations... at the core of the area in which individuals may have reasonable expectations of privacy". United States v. Turk, 526 F.2d 654 (5th Cir.), cert. denied, 429 U.S. 823 (1976) (footnote omitted). This policy has been articulated in several lower federal court decisions relating specifically to minimization. In United States v. King, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974), the court addressed the issue of standing to raise minimization. Concluding that one of the defendants, Maack, was an "aggrieved person" with standing to raise minimization, the court said:

On at least one occasion a message sent at his direction and a reply thereto were intercepted by Government agents. His privacy was thus invaded to the same extent as if he had taken the phone in hand and spoken on the line himself. Id. at 506.

The circumstances of King are certainly more attenuated than those in the instant case. While Maack had relayed at least one message through someone else, Daviage and Scott were actual parties to several conversations themselves.

In United States v. Bynum, 475 F.2d 832 (2nd Cir. 1973), the court relied on §§ 2510(11) and 2518(10)(a) to confer standing to raise minimization. In Bynum, the actual wiretap was placed on the

telephone of Bynum's paramour from whose residence Bynum placed his narcotics-related calls. The court said that because calls of Bynum's were intercepted,

Bynum was clearly an "aggrieved person" as defined in 18 U.S.C. § 2510(11) and therefore is given leave to raise the legitimacy of the surveillance under 18 U.S.C. § 2518(10). Id. at 835-36¹³ (footnote omitted).

See also United States v. Carubia, 377 F. Supp. 1099, 1107 (E.D. N.Y. 1974); United States v. Ceraso, 355 F.Supp. 126, 127 (M.D. Pa. 1973).

Although interpreting a different subsection of § 2518, United States v. Bellosi, 501 F.2d 833 (D.C.Cir. 1974)¹⁴ lends further support to Daviage's and Scott's standing argument. In that case, the Government had procured a wiretap order without informing the authorizing judge that one of the targets of the wiretap had been a target of a prior wiretap relating to a different offense. The defendants challenged the propriety of the authorization in their motion to suppress, and the Government argued that only the specific defendant who had been the target of the prior wiretap had standing to challenge the surveillance evidence. The Government's

^{13.} This decision was the first appeal in Bynum. Its complete citation is United States v. Bynum, 475 F.2d 832 (2d Cir.), on remand, 360 F.Supp. 400 (S.D.N.Y.), aff'd, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903, on remand, 386 F.Supp. 449 (S.D.N.Y. 1974), aff'd, 513 F.2d 533 (2d Cir.), cert. denied, 423 U.S. 952 (1975).

A subsequent decision in the Bynum litigation, United States v. Bynum, 513 F.2d 533 (2d Cir.), cert. denied, 423 U.S. 952 (1975), is cited in the Government's Brief in Opposition for the proposition that Congress did not intend to broaden standing principles in Title III. Id. at 6. This later Bynum decision, however, does nothing to weaken Daviage's and Scott's position. It simply held that eleven of the defendants did not have standing because none of them was a party to intercepted calls or possessed a proprietary interest in the premises in which the tapped telephone was located. The court went on to hold, however, that two other defendants, including Bynum, did have standing because they had been parties to intercepted communications.

^{14.} Bellosi deals with the impropriety of the authorization to seek a wiretap, whereas the instant case concerns the legality of the execution of a legally authorized wiretap. This distinction, however, is not significant in determining the question of standing. Section 2518(10)(a) cites three occasions for suppressing wiretap evidence: (1) the communication was unlawfully seized, (2) the order of authorization or approval was facially insufficient, or (3) the interception was not made in accordance with the order of authorization or approval. Certainly these reasons go to both authorization and execution. There is nothing in the language of § 2518 (or § 2510(11)) which suggests that Congress intended different standing rules to challenge the authorization of a wiretap as opposed to its actual execution

argument was based on the purpose of suppression, i.e., that violations of § 2518(i)(e) would be sufficiently deterred if the evidence were suppressed only as to the specific victim of the double wiretap. The court responded by relying on the language of Title III:

Though we would question the Government's judgment on how much a zealous law enforcement official would be deterred under its standing formula, we do not need to do so. It is sufficient to state that the Government's position has not been accommodated by the unambiguous criterion of standing set forth in Sections 2518(10)(a) and 2510(11). 501 F.2d at 842 (footnote omitted).¹⁵

Despite the clear language of §§ 2518(10)(a) and 2510(11), the legislative history of Title III, and judicial interpretations of standing to raise fourth amendment claims both before and after Title III's enactment, the Government continues to argue that Daviage and Scott lack standing. In its Brief in Opposition, the Government seems to be making two arguments. It asserts that because the intercepted calls to which they were parties were all related to the purpose of the wiretap, they therefore lack standing. However, the Government parenthetically injects a second notion -- that Daviage and Scott lack standing because they were not the subscribers to the tapped telephone. See Brief in Opposition at 6.¹⁶ For these arguments, the Government cites Alderman v. United States, supra; United States v. Poeta, 455 F.2d 117 (2d Cir.), cert. denied, 406 U.S. 948 (1972); United States v. Ramsey, 503 F.2d 524 (7th Cir. 1974), cert. denied, 420 U.S. 932 (1975); and United States v. Hinton, 543 F.2d 1002 (2d Cir.), cert. denied, 429 U.S. 980 (1976); and United States v. Fury, 554 F.2d 522 (2d Cir. 1977), petition for cert. filed, (May 27, 1977) (No. 76-6828).

15.

In footnote 22, the Bellosi court relies on the legislative history of Title III, Alderman and Jones in support of its holding that all of the defendants had standing.

16. It is noteworthy that Thurmon, whose standing the Government does not contest, was likewise not the subscriber to the telephone. The subscriber was, in fact, Geneva Jenkins, although Thurmon apparently shared the premises.

Taking the second argument first, the Government looks for support to the one paragraph statement in United States v. Poeta, 455 F.2d at 122. In dealing with Poeta's allegation that the agents failed to execute minimization provisions in the wiretap order, the Poeta court says, simply, that although Poeta was a party to intercepted calls, the wiretap itself was on someone else's telephone, and, therefore, Poeta's rights were not invaded.

The only authority the Poeta court cites for its ruling is Alderman v. United States, supra, and to the extent that it relies on Alderman, it plainly misreads that opinion. Alderman states that fourth amendment rights are "personal" and cannot be "vicariously asserted." 394 U.S. at 174. Alderman, however, explains what is meant by violation of these "personal" rights by saying:

Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself.... 394 U.S. at 176.

There is nothing in Alderman which limits standing to the actual subscriber of the telephone. By its very terms, the opinion says that one's own privacy is invaded if he is a party to intercepted communications.

Alderman states only the obvious: a telephone conversation does not "belong" to either participant alone. Spoken words which exist as electrical impulses along a wire cannot be said to be the "property" of one conversant and not the other. It is even more absurd to assert that, should such a proprietary interest exist in a telephone conversation, that "interest" fluctuates between Jones and Smith, depending on whether the Government attaches its listening device to Jones' telephone (while he is talking to Smith) or Smith's telephone (while he is talking to Jones). As Mr. Justice Brandeis noted in his famous dissent in Olmstead v. United States, 277 U.S. 438, 476 (1928):

Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him.

If there were any doubt as to whether a possessory interest in the telephone is required, such doubt was laid to rest in Katz v.

United States, supra. As Mr. Justice Stewart noted, "the Fourth Amendment protects people, not places." 389 U.S. at 351. In Katz the Government argued that since the petitioner's conversations were intercepted by tapping a telephone in a glass booth, he could not reasonably expect privacy. In rejecting this argument, the Court said that by using a telephone, petitioner meant to exclude "not the intruding eye— it was the uninvited ear." Id. at 352. Indeed, the Court explicitly recognized the sanctity of conversation itself:

No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. Id. at 352 (footnotes omitted).

See also Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 304 (1967); United States v. Hunt, 505 F.2d 931 (5th Cir. 1974).¹⁷

The Government's principal argument is that, as Daviage and Scott were parties to inculpatory calls and not to calls unrelated to the purpose of the wiretap, they do not have standing to raise minimization. The fundamental fallacy of this position is that it confuses standing with evidence of a failure to minimize.¹⁸ There are several types of evidence which show a failure to minimize. One consists of particular interceptions which could not possibly have been interpreted as related to the wiretap when they were overheard. See infra, at p.48 n.64. Another is the agents' own in-court statements as to their conduct and the procedure followed

¹⁷ The Government attempts to bolster its proprietary interest argument by citing United States v. Ramsey, supra, and United States v. Hinton, supra. These two cases, however, both cite and explicitly rely on Poeta, thereby incorporating Poeta's misapplication of Alderman. Therefore, they suffer from the same analytic weakness which afflicts Poeta.

¹⁸ The Court of Appeals in Scott also recognized this distinction:

The question presented by the Government's challenge [to standing] is really whether some of the appellees can introduce evidence based on conversations in which they did not participate in order to attempt to demonstrate that the intercepted conversations to which they were a party were not, in the statutory phrase, seized "in conformity with the order of authorization." 504 F.2d at 197 (footnote omitted).

pursuing the wiretap. Both kinds of evidence were produced in the instant case in support of the minimization claims. See infra at pp. 38-39. However, there is a fundamental distinction between evidence which goes to deciding the merits of a minimization claim and facts which must be shown in order to have standing to raise such a claim.

In support of its "evidence on merits equals standing" argument, the Government cites United States v. Fury, supra.¹⁹ In Fury, two wiretaps were authorized - the "Schnell" tap and the "Fury" tap. After noting that some of the defendants did not have standing because they were not parties to any intercepted communication, the Court, at p. 526, says:

Fury, on the other hand, has standing as an aggrieved person to challenge both the Schnell and Fury wiretaps. See New York Civil Practice Law and Rules ("CPLR") § 4506(2). Fury does not have standing, however, to raise the issue of improper "minimization" during the Schnell tap. That is because the tap on Schnell's phone and the failure to minimize the conversations intercepted is an invasion of Schnell's privacy, not Fury's. United States v. Poeta, 455 F.2d 117, 122 (2d Cir.), cert. denied, 406 U.S. 948, 92 S. Ct. 2041, 32 L.Ed.2d 337 (1972); People v. Fiorillo, 63 Misc.2d 480, 481, 311 N.Y.S.2d 574 (Montgomery Cty. Ct. 1970). See Alderman v. United States, 394 U.S. 165, 171-76, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); United States v. Hinton, 543 F.2d 1002 1011, n. 13 (2d Cir. 1976).

The Fury analysis is obscure at best. In the initial sentence the Court unequivocally states that Fury has standing as an aggrieved person. Yet, the court then takes back in the second sentence what it had seemed to confer in the first sentence. Thus, it would appear that Fury is setting up two standards: one for standing to challenge wiretap evidence generally, and a second to

¹⁹

Although it is not entirely clear what authority the Government cites in support of this argument, Daviage assumes that Fury is intended as support for the proposition. This assumption is based on the Fury court's citing of People v. Fiorillo, 63 Misc.2d 480, 311 N.Y.S.2d 574 (Montgomery Cty. Ct. 1970), a New York trial court decision squarely supporting "evidence on merits equals standing." See the discussion of Fiorillo, infra, at p. 23.

raise the minimization violation specifically.²⁰ The opinion then cites People v. Fiorillo, 63 Misc.2d 480, 311 N.Y.S.2d 574, (Montgomery Cty. Ct., 1970). That trial court decision squarely supports the Government's "evidence on merits equals standing" argument. The defendants had objected to the absence of provisions in the warrant to minimize interception of innocent telephone calls. After noting that the defendants had no innocent calls intercepted, the court ruled: "The aggrieved persons would be those whose unrelated telephone calls were intercepted." 63 Misc.2d at 481, 361 N.Y.S.2d at 576. Fiorillo is the only case Daviage has discovered which supports this argument of the Government.²¹ Regrettably the Fiorillo opinion contains no reasoning or relevant case authority.²² Fury's mere citation of Fiorillo thus adds no light.²³

20.

The New York wiretap statute has its own standing and minimization provisions, and its own exclusionary remedy. Because "[t]he New York statute virtually tracks the language of Title III," United States v. Tortorello, 480 F.2d 764, 772 (2d Cir.), cert. denied, 414 U.S. 866 (1973), it is admittedly difficult to conclude that New York's law sets out a double level standing criteria but that Title III does not. Nevertheless, Daviage indulges in the assumption that Fury's reference to standing under the New York statute was somehow not meant to pertain to standing under the minimization provision. Otherwise, the first sentence of the above quoted passage in Fury is directly contradictory to the second sentence.

21. There is a hint of this argument at the conclusion of the brief discussion of standing in United States v. Ramsey, 503 F.2d at 532. The court makes reference to the interpretation that "any casual caller engaging in innocent conversation," would have standing. Id. (emphasis supplied). The court then notes that because all of the calls in which Ramsey participated were inculpatory, he did not have standing. See also Brief for the United States in Opposition to the Petition for Writ of Certiorari, Fury v. United States, No. 76-6828 (Supreme Court of the United States, Oct. Term, 1977) at 4-5.

22. There is virtually no analysis in Fiorillo, and the only authority it cites is United States v. Serrano, 317 F.2d 356 (2d Cir. 1963). Serrano is not a minimization case, nor is it even an electronic surveillance case. The two paragraph per curiam decision apparently holds (the facts are not stated) that Serrano could not move to suppress evidence seized incident to the arrest of someone else. Serrano does not stand for the proposition that one must have made calls unrelated to the purpose of a wiretap order to have standing to raise minimization.

23. To make matters even more confusing, Fury invokes the proprietary interest language of Poeta and Hinton. To the extent that Fury seeks to invoke the reasoning of those cases, it is incorrect for the reasons already given.

Ultimately, the logic of the "evidence equals standing" position rests squarely on a bootstrapping argument relying on the nature of the calls intercepted rather than the parties to the calls intercepted. Since the calls to which Daviage and Scott were parties were inculpatory, so the argument goes, they should not be heard to complain that those calls were intercepted in gross and flagrant violation of the wiretap order. This reasoning does violence to well-established fourth amendment principles. As this Court said in Byars v. United States, 273 U.S. 28 (1927):

Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search... may be used against the victim of the unlawful search.... Id. at 29-30.

See also United States v. DiRe, 332 U.S. 581 (1948).

The nature of the call was clearly not deemed relevant in a number of minimization cases. For example, in United States v. King, 478 F.2d 494, 506 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974), one defendant was held to have standing on the basis of having had one message sent at his direction over the tapped line. Although this message was apparently inculpatory, the court never inquired into the nature of the call in order to resolve the standing issue. Rather, it determined that the defendant had either been a party to an interception or been the person against whom the interception order was directed. This approach was followed in United States v. Bynum, 475 F.2d at 835-36, in which, again, the court never determined the nature of the interceptions before ruling on standing. See also United States v. Carubia, 377 F.Supp. at 1107; United States v. Ceraso, 355 F.Supp. at 127.

By focusing on the nature of the calls, the Government would have one believe that because the calls were inculpatory there was, a fortiori, no conceivable minimization issue. Daviage submits, however, that the issue remains vital regardless of the type of

calls intercepted. If a government agent attached a tape recorder to a private telephone line and left it running for thirty days with no monitoring,²⁴ it would be difficult to argue that the victim of those interceptions did not have standing to raise failure to minimize.²⁵ If, fortuitously, it turned out that all of the interceptions related to the purpose of the tape, the situation would nonetheless be that of a very fruitful general warrant. In short, to make standing to raise minimization or, for that matter, to make the merits of a minimization claim rest on the nature of the items seized, injects into search and seizure doctrine, a process that is tantamount to a general warrant-- the very evil which the fourth amendment was designed to eliminate.²⁶

II. THE GOVERNMENT'S ROUND-THE-CLOCK SURVEILLANCE, ENTAILING INTERCEPTION OF EVERY CONVERSATION WITH NO GOOD FAITH ATTEMPT TO MINIMIZE THE INTERCEPTION OF NON-PERTINENT COMMUNICATIONS, CONSTITUTED A BLATANT VIOLATION OF 18 U.S.C. § 2518(5).

A. The Constitutional Significance Of The Minimization Issue.

In the case under review, this Court confronts, for the first time, the problem of construing the minimization requirement of 18 U.S.C. § 2518(5) and of defining the appropriate criteria by

24.

Plainly the tape recording of a conversation without the contemporaneous reception by a human ear constitutes an interception within the § 2510(4) definition of "intercept." Indeed, this very point was decided in United States v. Turk, 526 F.2d at 658:

If a person secrets a recorder in a room and thereby records a conversation between two others an "acquisition" occurs at the time the recording is made.

25.

This hypothetical fact situation differs from the instant case insofar as there was actual monitoring in this case. Of course, where there is a live ear overhearing each call, the situation is aggravated.

26.

See Camara v. Municipal Court, 387 U.S. 523 (1967).

which compliance is determined. It is important to note at this point, however, that this Court's construction of § 2518(5) is laden with constitutional implications and its delineation of standards is necessarily limited by fourth amendment considerations.²⁷ It is well-settled that the concerns which guided the drafting of the fourth amendment²⁸ are equally applicable to a search and seizure effected by electronic surveillance. Indeed, it is precisely the revulsion toward the general warrant which prompted some to insist that electronic surveillance can never be "reasonable" within the meaning of that amendment.²⁹ As stated by Mr. Justice Brennan in his dissenting opinion in Lopez v. United States, 373 U.S. 427 (1963),

electronic surveillance is almost inherently indiscriminate, so that compliance with the requirement of particularity in the Fourth Amendment would be difficult; Id. at 463.

Nevertheless, this Court has unequivocally established, in the last decade, that the stringent requirements of the fourth amendment applicable to conventional search and seizures are equally applicable to electronic surveillance; it is no longer open to question

27.

Mr. Justice Miller, in his concurring opinion in Boyd v. United States, 116 U.S. 616 (1886), stated the underlying theme:

While the framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only unreasonable searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place, for anything. Id. at 641. (Emphasis in original).

28. See, e.g., United States v. Leta, 332 F.Supp. 1357, 1360 n. 4 (M.D.Pa. 1971); United States v. Focarile, 340 F.Supp. 1033, 1046 (D.Md.), aff'd, sub nom. United States v. Giordano, 469 F.2d 522 (4th Cir. 1970), rev'd on other grounds, 416 U.S. 505 (1974).

29. Mr. Justice Brennan posits that the "anomalous exceptions" to fourth amendment principles in Olmstead v. United States, 277 U.S. 438 (1928), Goldman v. United States, 316 U.S. 129 (1942), and On Lee v. United States, 343 U.S. 747 (1952), were in part the result of "the pervasive fear that if electronic surveillance were deemed to be within the reach of the Fourth Amendment, a useful technique of law enforcement would be wholly destroyed,..." Id. at 463.

that electronic surveillance may be "reasonable." Osborn v. United States, 385 U.S. 323 (1966); Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967).

In establishing the standards by which the constitutionality of electronic surveillance under the fourth amendment is assessed, this Court focused on the requirement of particularity which acts as protection against the general warrant. In Osborn v. United States, supra, an attorney for James R. Hoffa was convicted of endeavoring to bribe a member of the jury panel in a prospective federal criminal trial. Admitted into evidence was a tape recording of a conversation made between the attorney and a government informer, who had a recording device concealed on his person during that conversation. Noting that the device was used "under the most precise and discriminate circumstances, circumstances which fully met the 'requirement of particularity'," Id. at 329, this Court held that the use of the device and the recording itself was permissible "for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations." Id. at 330.

In its landmark decision in Berger, supra, this Court vigorously reasserted the importance of the fourth amendment's requirement of particularity. Mr. Justice Clark stated that

the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to "seize" any and all conversations... . As with general warrants this leaves too much to the discretion of the officer executing the order. Id. at 59. (emphasis supplied).

Relying for the most part on this defect, but also noting the lack of other protective procedures, this Court held that the New York statute permitted "a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment." Id. at 64, (emphasis supplied.)

The most recent case of this trilogy, Katz, supra., again emphasized that the requirement of particularity is an essential component of a reasonable search and seizure. This Court held that, absent antecedent judicial authorization and determination of probable cause, the surveillance in that case violated the fourth amendment. However this Court also noted that

the surveillance was limited, both in scope and in duration, The agents confined their surveillance to the brief periods during which he [petitioner] used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself. Id. at 354. (footnotes omitted).

The constitutionality of a search and seizure, then, is heavily dependent upon satisfying the requirement of particularity. The drafters of Title III, seeking to meet the standards delineated in Osborn, Berger and Katz, were well aware of this and forged a procedure meant to conform with constitutional demands.³⁰ This Court, in deciding what compliance with § 2518(5) entails, must do so with this constitutional background in mind. However, this question, "fraught as it is with substantial constitutional overtones",³¹ can be settled as a matter of statutory construction.

B. Standards Governing The Determination Of compliance With 18 U.S.C. § 2518(5).

Section 2518(5) of Title 18 provides in pertinent part:

Every order...shall contain a provision that the authorization to intercept..., shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception....

The statute provides no further clarification as to the meaning of "minimize."³² Although this Court has not previously construed the provision, several lower federal court decisions make it clear that § 2518(5) does not prohibit the interception of any non-pertinent conversations, but directs the Government to conduct the wiretap in a manner designed to reduce to the smallest degree possible the interception of conversations unrelated to the criminal activity under investigation. United States v. Clerkley, 556 F.2d 709, 716 (4th Cir. 1977); United States v. Armocida, 515 F.2d 29

30.

See Bynum v. United States, 423 U.S. 952 (1975) (Mr. Justice Brennan, dissenting from denial of petition for writ of certiorari).

31.

Scott v. United States, 425 U.S. 917, 925 (1976) (Mr. Justice Brennan, dissenting from denial of petition for writ of certiorari).

32.

The legislative history of Title III offers no definition of "minimize", but merely reiterates the language of §2518(5). See S.Rep. No. 1097, 90th Cong. 2nd Sess. 103, reprinted in 1968 U.S. Code Cong. & Ad. News at 2192.

(3rd Cir.), cert. denied, 423 U.S. 858 (1975); United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974).

Such a construction of the requirement, while entirely consistent with the text of § 2518(5), also accurately reflects the intention of the drafters of Title III. The statutory scheme represents a balance, fashioned by Congress, between the competing values of law enforcement and the right to privacy.³³ By carefully prescribing the circumstances under which electronic surveillance may be authorized in accord with Berger v. New York, supra, and Katz v. United States, supra, Congress sought to afford effective techniques to combat organized crime while preventing "improper invasion of the right of privacy provided by the Fourth Amendment and...the indiscriminate seizure of communications...." United States v. Focarile, 340 F.Supp. at 1044. In a similar manner, the "minimization" provision is a balance between these conflicting goals. While recognizing that a requirement of absolute elimination of interceptions of innocent communications would seriously jeopardize the statutory purpose of crime control,³⁴ the drafters of Title III designed minimization as a safeguard against any invasion of privacy greater than necessary under the circumstances. See Berger, 385 U.S. at 57. Section 2518(5), then, "requires that measures be adopted to reduce the extent of such interception to a practical minimum while allowing the legitimate aims of the Government to be pursued." United States v. Turner, 528 F.2d 143 (9th Cir.), cert. denied, 423 U.S. 996 (1975).³⁵

³³ See pp.12-14, supra.

³⁴ See United States v. Bynum, 485 F.2d 490, 500 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974).

³⁵ "What is important is that the facts in the application on a case-by-case basis justify the period of time of the surveillance." S. Rep. No. 1097, 90th Cong., 2nd Sess. 101, reprinted in 1968 U.S. Code Cong. & Ad. News at 2190. United States v. James, 494 F.2d 1007, 1018 (D.C.Cir.), cert. denied, 419 U.S. 1020 (1974); see also United States v. Armocida, supra; United States v. Clerkley, supra.

1. The Good Faith Test.

Proceeding on the proposition that the surveillance must be "reasonable" to comport with § 2518(5), the federal courts have shaped a standard by which compliance with the minimization requirement can be assessed. The cases establish that the statutory command of minimization is satisfied if (1) the agents manifest a good faith effort to minimize the interception of innocent communications, and (2) the methods employed in minimization are reasonable in light of the circumstances. The courts have made clear that absent good faith efforts to minimize, the second inquiry should not be reached; the conduct of the surveillance is unreasonable per se. On the other hand, where attempts to comply are found, they must still conform to a standard of reasonableness.

This two-pronged standard³⁶ began its development in the early cases addressing the minimization issue. In United States v. King, 335 F.Supp. 523 (S.D. Cal. 1971), rev'd on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974), the district court found that the Government had failed to comply with the minimization requirement. The authorizing order specified the communications which could be lawfully intercepted. However, the court found that the wiretap was in operation for forty-five days, twenty-four hours a day, and that the agents recorded every conversation regardless of the parties to or nature of the communication. Stating that "compliance with the provisions of the authorizing order requires those responsible for the execution of the wiretap to devise some means of limiting interception." to specified conversations, 335 F.Supp. at 541, the court was skeptical of the agents' adherence to the minimization requirement. It referred to one intercepted conversation which entailed forty-four pages of transcript. The conversation was completely irrelevant, with the exception of two pages in the middle of the tran-

³⁶ The standard was first, and most clearly, articulated in United States v. Tortorello, 480 F.2d 764 (2d Cir.), cert. denied, 414 U.S. 866 (1973). See discussion, infra, at Pp. 33-35.

script. The Court stated:

Nevertheless this Court is reluctant to find that this conversation should have been intercepted. The object of minimization is to prevent the wiretap from turning into the kind of general search and wholesale invasion of privacy decried by the Supreme Court in *Berger v. New York*, supra, and *Katz v. United States*, supra. By justifying blanket surveillance on the ground that something relevant might turn up at any moment, the requirement of minimization would be rendered nugatory and the right of privacy non-existent. Id. at 541. (emphasis supplied).

The court acknowledged the difficulties inherent in electronic surveillance but clearly recognized the threat to privacy should those difficulties be employed as justification for total interception. Indeed, the court pointed out that when the competing interests of law enforcement and privacy clash, deference must be given to the latter "out of respect for the parties' constitutional rights and for the limited system which Congress so painstakingly created." Id. at 542.

The opinion in *United States v. Focarile*, supra, represents an early effort by a court to carefully analyze the issue of minimization and to articulate guidelines for determining compliance with § 2518(5).

In *Focarile*, as in the instant case, there was total interception for thirteen days. Finding neither clarity nor consistency among the three cases construing the minimization provision - *United States v. King*, 335 F.Supp. 523 (S.D.Calif. 1971); *United States v. Leta*, 332 F.Supp. 1357 (M.D.Pa. 1971);³⁷ and *United States v. Scott*, 331 F.Supp. 233 (D.D.C. 1971) - the Court stated:

Scott, *King* and *Leta*, as well as a common sense approach to the problem lead one to the conclusion that there can be essentially two different types of violation of the minimization requirement of § 2518(5). The first type of violation would be the one committed if there had been no attempt at all to minimize the interception of "innocent" calls. This

³⁷. Although *Leta* does not elaborate on the issue of minimization, it is significant insofar as it substantiates the good faith test. Recognizing that 100% interception may be necessary under some circumstances, and that while this is not unreasonable per se, "it may also be that 100% recording will take place without an effort to minimize where possible. In such a situation, 18 U.S.C. § 2518(5) will have been violated...." Id. at 1360 n. 4.

first type of violation would obviously be a blatant violation of the provisions of Title III and, in addition, would probably violate the precepts of the Fourth Amendment. The second type of violation of the minimization requirement would be the one committed if there is an inadequate method or effort to minimize. Id. at 1046. (footnote omitted).

Thus the court emphasized that the threshold question is whether there has been any effort or "good faith" attempt to comply with § 2518(5). Absent such attempt, the agents' conduct is unreasonable under the terms of Title III and, under the command of *Berger* and *Katz*, violative of the fourth amendment. But, should there be manifestations of good-faith attempts to comply with § 2518(5),³⁸ the inquiry then focuses on the adequacy of those attempts. As numerous cases make clear, those efforts are measured in terms of reasonableness.³⁹ See discussion, infra, at pp.43-52.

On the issue of compliance with the statute, *Forcarile* purports to distill several fundamental ideas from the few previous cases. But more importantly, it establishes a basic test for ascertaining the propriety of governmental conduct, and that approach has been accepted in subsequent decisions.

A further illustration of the development of this test is *United States v. Sisca*, 361 F.Supp. 735 (S.D.N.Y. 1973), aff'd, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974). The Government sought to justify total interception because of the

³⁸. The cases have come to recognize several factors as manifesting the government's good faith efforts to comply with the minimization requirement. See, e.g., *United States v. Hinton*, 543 F.2d 1002, 1012 (2d Cir.), cert. denied, 429 U.S. 980 (1976); *United States v. Rizzo*, 491 F.2d 215, 217 (2d Cir.), cert. denied, 416 U.S. 990 (1974); *United States v. Daly*, 535 F.2d 434, 441 (8th Cir. 1976) (system of "spot-checking" to insure that conversations initially innocent did not turn to pertinent subjects); *United States v. Clerkley*, 556 F.2d at 718; *United States v. Tortorello*, 480 F.2d at 784; *United States v. Cox*, 462 F.2d at 1301, (judicial supervision); and *United States v. Turner*, 528 F.2d at 158; *United States v. Falcone*, 364 F.Supp. 877, 887 (D.N.J. 1973), aff'd, 505 F.2d 478 (3rd Cir. 1974), cert. denied, 420 U.S. 955 (1975); *United States v. Lanza*, 349 F.Supp. 929, 932 (M.D.Fla. 1972) (instructions to the agents executing the wiretap).

³⁹. The *Focarile* court found the efforts to minimize reasonable under the circumstances.

inherent difficulties faced by the monitoring agents. The court acknowledged the practical problems involved, yet decided that

the absence of any precautions to insure minimization here, the number of such calls intercepted and the lack of supervisory techniques impel the conclusion that the minimization requirements were not satisfactorily observed. Id. at 745.⁴⁰

The import of this language is precisely that the agents made no attempts to minimize.

The good faith test developed by these district court cases has been uniformly adopted among the circuits. The appellate opinions consistently require that the monitoring agents make good faith attempts at minimization, either explicitly, by finding the requisite good faith effort, or implicitly, by immediately proceeding to determine the reasonableness of the attempts. With the notable exception of the Court of Appeals for the District of Columbia in Scott II, no court has found compliance with § 2518 (5) where the record shows, as it does here, that the agents made no effort to minimize the interception of non-pertinent communications.

In United States v. Tortorello, supra, the appellant contended that the surveillance was conducted in a manner that resulted in unnecessary monitoring and recording of irrelevant conversations. This, he urged, violated the fourth amendment and the provisions of the authorizing order requiring minimal interception of non-pertinent communications pursuant to § 2518(5). The court stated: "The question raised here is whether the executing officers took reasonable measures to minimize the interception of irrelevant communications." 480 F.2d at 783 (emphasis supplied). Looking to the existing case law for guidance, the court then discussed the district court's initial opinion in the instant case which

^{40.}

Because the motion to suppress the evidence derived from the wiretap was not timely made, the court's discussion on the merits is dicta. The Court felt, however, that a discussion would be "desirable" in light "of the importance and relative novelty of the minimization question and the evolving law on the subject." Id. at 742.

suppressed the wiretap evidence. Tortorello concluded: "In short, the court [in United States v. Scott, 331 F.Supp. 233 (D.C.C. 1971)] found that there was no attempt by the officers to devise some means of limiting interceptions." 480 F.2d at 784.

The court in Tortorello compared the conduct of the agents who executed the wiretap in that case with the conduct of the agents in Scott. It noted that the agents in the case before it showed "good judgment" in devising patterns to guide their minimization efforts. Moreover, they considered the identity of the caller, the guarded nature of the conversation, the tone of voice and the subject matter and "[a]s soon as it was determined that any conversation overheard was not pertinent, all interception immediately ceased." 480 F.2d at 783. Referring to United States v. King, supra, and United States v. Sklaroff, 323 F.Supp. 296 (S.D.Fla. 1971), the court framed the test which should govern the determination whether there has been compliance with the minimization requirement:

It is clear from these decisions that a court should not admit evidence derived from an electronic surveillance order unless, after reviewing the monitoring log and hearing the testimony of the monitoring agents, it is left with the conviction that on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion. 480 F.2d at 784.

Since "the officers respected the privacy of the persons under surveillance and utilized effective safeguards against excessive intrusion", Id. at 785, the court ruled that the wiretap evidence was properly admitted.⁴¹

^{41.} See People v. Floyd, 41 N.Y.2d 245, 392 N.Y.S.2d 257 (1976), where the court of appeals construed the virtually identical minimization requirement of New York C.P.L. 700.30, subd. 7. Quoting United States v. Tortorello, supra, the court stated:

Minimization may be defined as a good faith and reasonable effort to keep the number of non-pertinent calls intercepted to the smallest practicable number. Id. at 262.

That court recently reaffirmed this application of the two-prong standard in People v. Brenes, 42 N.Y.2d 41, 396 N.Y.S.2d 629 (1977), stating that "the primary question is whether, realistically considered, there was a good faith attempt to affirmatively avoid interception of conversations unrelated to the crime or crimes authorized to be investigated...." Id. at 633.

The Tortorello test for assessing compliance with the minimization requirement clearly contemplates more than merely reasonable results. At the very least, reasonableness of conduct must include a good-faith effort to avoid that intrusion.

This good faith test in assessing compliance with the minimization requirement has been consistently applied in the Second Circuit. In United States v. Bynum, 485 F.2d 490, 501 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974), where total interception was held reasonable under the circumstances, the court discusses the good faith requirement in the context of judicial supervision,⁴² stating that "the degree of judicial supervision is an important factor in determining whether a good faith effort to minimize was attempted." In United States v. Manfredi, 488 F.2d 588, 600 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974), the court of appeals again had occasion to determine compliance with § 2518(5). It reiterated the principle established in Tortorello, stating that the statute requires "that the methods used to effect minimization be in good faith and reasonable." The court held that the Government had made a prima facie showing of compliance with the minimization provision, attaching great significance to the trial court's finding of good faith.⁴³

The validity of the good faith test was most recently affirmed in United States v. Hinton, 543 F.2d 1002 (2d Cir.), cert. denied, 429 U.S. 980 (1976). In that case, the agents conducting the surveillance took several steps to minimize the interception of innocent communications, such as "spot checking" to insure that conversations initially non-pertinent did not become ones subject to interception, and employing a maximum time period of five minutes to ascertain the nature of the call. Further, this was "not a case where every conversation coming into and emanating from the wiretapped residences was recorded and overheard in its

42.

See infra, at p. 36.

43.

The court stated: "We are aided by the trial court's finding that the law enforcement agents here made a 'good faith effort to minimize'...." 488 F.2d at 599.

entirety," Id. at 1012, as is the instant case. To determine compliance with the minimization requirement, the court stated:

We must look to whether the agents devised a reasonable means of limiting interception, and to whether they utilized those safe-guards in good faith. Id. at 1012 (emphasis supplied).

The court held that the agents complied with the requirement, stating that "it appears that a good faith attempt was made to limit intrusion into private intimacies so as to preserve the privacy interests of those whose conversations were monitored." Id. at 1012.⁴⁴

This standard has been widely adopted in the other circuits. In United States v. Clerkley, supra, the Court of Appeals for the Fourth Circuit agreed that a showing of reasonableness necessarily requires a showing of a good faith attempt to minimize. Quoting Tortorello, it stated:

The statute is deemed to be satisfied if "on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion." 556 F.2d at 716.

The court's holding that the Government had complied with the requirement was due in part to its finding that "[w]here the authorizing judge required and reviewed interim reports, courts have been more willing to find a good faith attempt at minimization." Id. at 718. Similar language of good faith is present in United States v. Quintana, 508 F.2d 867 (7th Cir. 1975).⁴⁵

⁴⁴ See also United States v. Fino, 478 F.2d 35 (2d Cir. 1973), cert. denied, 417 U.S. 918 (1974), where the court accepted "the finding of the district court that 'the evidence established a good faith effort on the part of the monitoring agents to discontinue all calls believed to be of a non-pertinent nature.'" Id. at 38.

⁴⁵ In the instant case, the judicial supervision was exercised in an effort to enforce minimization was inadequate at best. See discussion infra, at 51-52.

Numerous other cases amply demonstrate the continued vitality of the requirement that the executing agents make good faith attempts to minimize. See United States v. Daly, 535 F.2d 434, 442 (8th Cir. 1976); United States v. Armocida, 515 F.2d 29, 42 (3rd Cir.), cert. denied, 423 U.S. 858 (1975); United States v. Chavez, 533 F.2d 491 (9th Cir.), cert. denied 426 U.S. 911 (1976); United States v. Turner, 528 F.2d 143, 156-57 (9th Cir.), cert. denied, 423 U.S. 996 (1975).⁴⁶

The good faith requirement is not only firmly embedded in the case law but is essential in order to insure that the protection for privacy which is built into Title III is more than theoretical:

Once the decisive test of the validity of an interception becomes its "objective reasonableness," there is grave danger that determinations of reasonableness will be dictated by hindsight evaluations of evidence uncovered by wiretaps.

* * *

[Such a test] appears to destroy any incentive for law enforcement agents conducting wiretap surveillances to respect the rights of citizens to privacy in non-criminal telephone conversations in advance of their intrusion.

The good faith test effectively mitigates the dangers of retroactive validation. By requiring an initial regard for the right of privacy, it insures that, at the very least, § 2518(5) will encourage the development of techniques designed to limit unnecessary intrusion. To the extent that the good faith test is eliminated or relegated to a subordinate role,⁴⁸ the minimization provision

⁴⁶. Cf. Zweibon v. Mitchell, 516 F.2d 594 (D.C.Cir. 1975), cert. denied, 425 U.S. 944 (1976), where the court found that a good faith defense to liability under 18 U.S.C. § 2520 will be established where the agents demonstrate that they had a subjective good faith belief that it was constitutional to install warrantless wiretaps under the circumstances of the case and that this belief was itself reasonable.

⁴⁷. Scott II, 522 F.2d at 1334 (Statement of Circuit Judge Robinson, as to why he would grant rehearing en banc).

⁴⁸. This is precisely what the court in Scott II did. See discussion, infra, at p.40.

becomes largely a hollow protection.

2. The Application Of The Good Faith Test In The Scott Litigation.

In the first interlocutory appeal in these proceedings, the court of appeals determined that the lower court had applied an improper standard in finding that the agents failed to comply with the minimization requirement.⁴⁹ The court stated:

As James and other cases make clear, any minimization determination requires an assessment of the reasonableness of the agents' efforts in light of the purpose of the wiretap and the information available to them at the time of interception.

* * *

It appears that the trial court's conclusion that the agents made no attempt to minimize stemmed in large part from its conclusions that they failed to succeed. The court relied heavily upon the fact that some sixty percent of the intercepted conversations appeared to be unrelated to narcotics transactions.

* * *

This court's intervening opinion in James indicates that an assessment of the reasonableness of agents' attempts to minimize must be judged on a considerably more particularized basis. Scott I, 504 F.2d 194 at 198, (D.C. Cir. 1974).

Following remand, the district court made the following findings of fact:

3. That Special Agent Cooper and the monitoring agents knew that the Statute and the authorization required such minimization.

4. That the monitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the Jenkins telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion.

* * *

⁴⁹. The decision in this first interlocutory appeal was held in abeyance pending issuance of the opinion in United States v. James, 494 F.2d 1007 (D.C.Cir.), cert. denied, 419 U.S. 1020 (1974). In James, the court unequivocally adopted the Tortorello standard. Nevertheless, in applying the test, James did not discuss the good faith efforts of the agents. It is not clear from the opinion whether the court implicitly found good faith efforts or merely ignored this standard despite the purported adoption of the Tortorello test.

10. That at the hearings in April, 1971, Special Agent Glennon L. Cooper testified under oath...that he and the agents working under him knew of the minimization requirement but made no attempt to comply therewith. At the hearing on remand Agent Cooper repeated that testimony as follows [in part]:

Q Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number?

A That is correct, Your Honor.

13. An examination of the totality of the conduct of the monitoring agents in this case during the duration of the authorized interception reveals a knowing and purposeful failure to comply with or even attempt to comply with the minimization requirements of the statute and the order of authorization.⁵⁰

These findings of facts are amply supported by the testimony of the Government's witnesses. They repeatedly stated that there were no efforts to minimize the interception of innocent conversations. Agent Cooper conceded that "there were no limitations placed on the interception of calls in this particular operation, in this particular instance."⁵¹ Indeed, this issue is not disputed by the Government, whose counsel stated during argument on remand that "we have never disputed at any point in this litigation that any attempts were made as a discretionary matter to minimize and I think that's what the agent said."⁵² Confronted with the Govern-

⁵⁰ Findings of Fact, Conclusions of Law and Order, United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 3-6. See the Addendum to this Brief, infra, at III-VI.

⁵¹ Transcript of Proceedings of October 15, 1974 in United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia), at 98. A copy of the transcript is included in the original record in this Court.

⁵² Transcript of Proceedings of October 18, 1974 in United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia), at 681. A copy of the transcript is included in the original record in this Court.

ment's concession that no efforts were made to comply with the minimization requirement, the district court held that "[t]he admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order was unreasonable"⁵³ and suppressed all the evidence derived from the wiretap.

Following the Government's second interlocutory appeal, the court of appeals again reversed the district court's decision to suppress the wiretap evidence. In assessing compliance with the minimization requirement, the court focused on the reasonableness of the ultimate results, and discarded the subjective intent of the agents as an independent factor to be satisfied:

For example, the agents could publicly declare their intent to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable. On the other hand, even if the agents make their best efforts to comply, the ultimate interceptions may prove to be so unreasonable that suppression is necessary. The presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirement has been satisfied but the decision on the suppression motion must ultimately be based on reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions. Scott II, 516 F.2d at 756 (footnote omitted and emphasis supplied).

In effect, Scott II utilized a "Monday-morning quarterback" standard where the interception of a communication is justified on the basis of a hindsight evaluation of reasonableness. This approach distorts the Tortorello standard and, as a practical matter, makes the agents' subjective intent irrelevant. By stating that "if every call intercepted had been narcotic related, there would have been no occasion to consider whether it was necessary to minimize", Id., the court permits the ultimate results to justify an admitted failure even to attempt compliance with the minimization. This is tantamount to permitting an illegal search

⁵³ Findings of Fact, Conclusions of Law and Order, United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 7. See the Addendum to this Brief, infra, at VII.

to be legitimized by what is found. In the context of traditional search and seizure doctrine, this Court has made it clear that the results of a search are not to be utilized in determining reasonableness. In United States v. DiRe, 332 U.S. 581 (1948), this Court spoke to the argument that the fruits of the search manifest its reasonableness, responding: "We have had frequent occasion to point out that a search is not to be made legal by what it turns up," Id. at 595 (footnote omitted). See also Byars v. United States, 273 U.S. 28, 29 (1927) in which the court stated: "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute." To the extent that the courts prefer "to consider wiretaps within the framework of the general law of search and seizure and to follow its principles," this Court has already declared the impropriety of post-search justification. See, e.g., United States v. King, supra.

Allowing post-hoc analyses to control the determination of compliance places too high a value on the Government's law enforcement objectives at the expense of constitutionally protected privacy. The court in United States v. King stated:

The requirements of the Fourth Amendment cannot be met by interceptions executed in a blanket fashion with the hope that the passage of time may invest them with a relevance not immediately apparent. 335 F.2d at 543.

Moreover, as the courts have recognized, retrospective analyses are often misleading and inaccurate. They represent merely an advocate's portrayal or characterization of what appeared to the agents during the surveillance.⁵⁴

The call analysis relied upon by Government in the instant case suffers from these infirmities. The district court found:

12. The "call analysis" was made by Mr. Kellogg in his capacity as an advocate without consultation with any federal narcotics agent and the categories were

⁵⁴ Minimization is not to be judged by a rigid hindsight that ignores the problems confronting the officers at the time of the investigation. United States v. Vento, 533 F.2d 838 (3rd Cir. 1976).

not shown to, looked at or validated by any such agent as "actual and realistic categories for agents to use in manning a wiretap." Mr. Kellogg described the "call analysis" as "...purely and simply an after-the-fact analysis, designed to provide the Court with a means of factually analyzing the conduct of the agents. It was not in an effort to infer, or assert that the agents followed these relatively sophisticated delineations in the course of the intercept. They did no[t] insofar as I understand. Tr. Hearing on Remand, p. 436

12. [sic] The "call analysis" conflicts with the reports and characterizations of the intercepted calls as made and determined by the monitoring agents whose conduct is controlling in this case.⁵⁵

The courts which have addressed this issue have uniformly stated that reasonableness of interception and of compliance with § 2518(5) must be determined in light of the facts known to the agents at the time. See, e.g., United States v. James, 494 F.2d 1007, 1022 (D.C.Cir. 1974), cert. denied, 426 U.S. 911 (1976); United States v. Laborga, 336 F.Supp. 190, 196 (W.D.Pa. 1971); United States v. Falcone, 364 F.Supp. 877, 887 (D.N.J. 1973), aff'd, 505 F.2d 478 (3rd Cir. 1974), cert. denied, 420 U.S. 955 (1975). Establishing reasonableness of the agents' conduct via a call analysis prepared after-the-fact and incorporating characterizations admittedly foreign to those used by the executing agents contradicts the general principle that "[t]he test of whether or not the minimization requirements are complied with is not retrospective but contemporaneous." United States v. Sisca, 361 F.Supp. at 735.⁵⁶

⁵⁵ Findings of Fact, Conclusions of Law and Order, United States v. Scott, et al., Crim. No. 1988-70 and 1089-70 (United States District Court for the District of Columbia) at 5-6. See the Addendum to this Brief, infra, at V-VI.

⁵⁶ The district court emphasized this problem during a "status call" hearing:

This "Call Analysis" differs from the call analysis that was made by the agents who were on the spot and the ones who were directed to comply with the order of minimization. Under such circumstances, there was a complete violation and I consider that even if the "Call Analysis" were correct, it is in the teeth and in derogation of the characterizations that the persons who were charged with the duty to make the characterizations are made.

Transcript of Proceedings of November 8, 1974, in United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia), at 14-15. A copy of the transcript is included in the original record in this Court.

Daviage does not contend that such "Monday-morning quarter-backing" is totally inappropriate. Although post-hoc analysis cannot be utilized as the sole basis for establishing compliance with § 2518(5), it can provide a "starting point", United States v. Armocida, 515 F.2d at 43, or "offer some insight on that issue." United States v. Focarile, 340 F. Supp. at 1049. However, such use must be narrowly limited when there is other direct and explicit evidence pertaining to the agents' compliance with the minimization requirement. Indeed, in the instant case, the circumstantial evidence provided by the call analysis must be viewed with caution.⁵⁷ There was ample testimony from the agents concerning their knowledge, conduct and intentions which makes their clear disregard for § 2518(5) manifest; the call analysis is an obvious attempt to rationalize the agents' behavior and should be accorded appropriate weight.

3. Reasonableness Of The Efforts To Minimize Interception Of Non-Pertinent Communications.

The application of the two-pronged Tortorello standard to the facts of this case requires reversal because of lack of good faith attempts to comply with § 2518(5). However, should this Court find that the agents' good faith has been demonstrated, or decide that this test should not be applied, it is necessary to determine the reasonableness of the actual minimization. The courts have identified several factors that determine the degree of minimization required in a given case. Typical of these cases is United States v. James, supra, which delineates four factors:

i) scope of the criminal enterprise under investigation; ii) location and operation of the wiretapped telephone; iii) the Government's expectation of the contents of the calls; and iv) judicial supervision by the authorizing judge. See United States v. Clerkley, 556 F.2d at 716-718; United States v. Daly, 535 F.2d at 441-442; United States v. Quintana, 508 F.2d at 874-875. Assuming arguendo,

⁵⁷ In the instant case, the Government's call analysis focuses on categories of calls and relies on percentages to show proper minimization. However, more revealing might be percentages of time for recorded conversations. See, e.g., United States v. King, supra, where the Government argued that only fourteen per cent of the calls were subject to minimization. The court deemed such percentage misleading because the percentage of calls was not necessarily proportional to time. 335 F.Supp. at 542.

that this Court needs to reach the issue of the reasonableness of actual minimization efforts, the record demonstrates that 100% interception was not reasonable compliance with the statutory requirement of minimization.

i) Scope of The Criminal Enterprise Under Investigation.

Although the court in Scott II stated that "[t]he trial court made no specific findings with respect to this factor," 516 F.2d at 758, the district court did consider it:

That the intercept revealed that the criminal operation under investigation was of lesser dimension than was originally anticipated.⁵⁸

Scott II makes short shrift of this factor, asserting that a "thorough surveillance" was justified because of the "[operation of] a fairly extensive narcotics business." Id. at 758. The surveillance here was much more than "thorough"; it was unlimited. Moreover, the scope of the enterprise was considerably less than that in James, which involved forty-five persons charged in seven separate indictments. Although the cases have recognized that large-scale, far-flung criminal enterprises may justify a lesser degree of minimization,⁵⁹ the testimony adduced at the evidentiary hearing revealed that the identities of conspirators gradually became known and that the actual scope of the operation was substantially narrower than originally believed. However, despite the trial court's explicit finding of fact, the court of appeals found that, while smaller geographically, the conspiracy's complexity

⁵⁸.

Findings of Fact, Conclusions of Law and Order, United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 3. See the Addendum to this Brief, infra, at III. Note, however, that Scott II incorrectly applies this finding only to the third criterion.

⁵⁹ United States v. Chavez, 533 F.2d at 493-494; United States v. Clerkley, 556 F.2d at 716.

remained unchanged. Scott II, at 759. The mere fact that the criminal operation was a local, retail business rather than an interstate, international enterprise necessarily means a change in complexity.

The James court, in noting that more complex conspiracies may justify greater surveillance, added that "if this thesis is taken to the extreme, the minimization requirement could be emasculated." 494 F.2d at 1020. Clearly, where the conspiracy under investigation is not particularly sophisticated, where its contours and members are increasingly well-defined, and where the scope narrows, it is an extreme position to allow total interception.⁶⁰

In relation to this factor, Scott II claimed that the use of coded language or "jargon" justified greater surveillance. Assuming that such a circumstance is appropriately considered,⁶¹ the record

⁶⁰. See United States v. Sisco, 361 F.Supp. 735 (S.D.N.Y. 1973), aff'd, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974) where the court acknowledged the nature and extent of the criminal narcotics enterprise being carried on and the great difficulties confronted by the agents. It noted, inter alia, the large number of participants in varying roles, the constantly expanding information pertaining to the operation; and the guarded and coded language. Nevertheless, it held that

the absence of any precautions to insure minimization here, the number of such calls intercepted and the lack of supervisory techniques impel the conclusion that the minimization requirements were not satisfactorily observed. Id. at 745.

⁶¹. The fact that many criminal conversations are carried on in guarded language, code words, or jargon peculiar to the particular subculture should not be invoked as justifying circumvention of the minimization requirement. It is reasonable to assume that agents assigned to a specific case, regardless of whether or not electronic surveillance is involved ordinarily are familiar with the argot of the group under investigation. Deliberately evasive conversations pose more of a problem, but not one that is insoluble. In many cases of cryptic conversations, a literal interpretation of the words exchanged would render them nonpertinent; the tone and manner of discussion, however, would indicate, even to the ear untrained in the art of law enforcement, that the innocuous exchange is a camouflage for criminal conversation. See, e.g., the two conversations transcribed in United States v. Bynum, 360 F.Supp. 400, 412-13 n.10 (S.D.N.Y.), aff'd, 485 F.2d 490 (2d Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3353 (U.S. Nov. 11, 1973) (No. 73-856). Furthermore, a law enforcement officer who has screened hundreds of calls between criminal suspects should be in a good position to

completely contradicts this conclusion. The testimony demonstrates that, while code terms were used, the executing agents were well-versed in the language and were not handicapped by it.⁶²

ii) Location and Operation Of The Wiretapped Telephone.

James found that where "a telephone is used exclusively to conduct illegal business and is located in a place which serves no residential or [legitimate] business purpose... less stringent minimization standards are both reasonable and permitted by Title III." 494 F.2d at 1020. It is not disputed that the telephone tapped in the instant case was located at a residence; further, at least sixty per cent of the calls intercepted were not related to narcotics. This is certainly a different situation from that in James where the telephone was used entirely for conducting an illegal enterprise and the apartment where it was located was used exclusively for the operation of the (fn. 61 cont'd.)

sift the coded conversations from the innocuous ones. If he reasonably and in good faith intercepts an entire conversation that he believes to be coded, the Government should not be penalized for his judgmental error if, in retrospect, the call turns out to be nonpertinent. On the other hand, facially innocent calls must be presumed to be nonpertinent, and the reasonableness of an agent's belief that a conversation is in code must be tested by objective standards. Cf. note 118 infra. If the rule were otherwise the Government could point to the possibility of coded calls as a rationale for interception of most, if not all, nonpertinent calls. 26 Stanford Law Review 1411, 1419-1420 n. 42 (1974).

⁶². A. [Agent Cooper] Well, there were numerous code terms used. It appears that certain individuals who became identified as callers, or customers, or suppliers, or whatever, would use their own terminology; not everyone used the same type of terminology. Once this terminology had been learned by us, that is, by agents of the Bureau during the operation of the wire intercept that had been completed not too long before this one, so we were alert for this type of language.

* * *

Q. [Mr. Dreos - Daviage's trial counsel] Well, I'm asking you, you did indicate that most of these people were experienced, isn't that correct?

A. [Agent Cooper] They had at least a year's experience and were aware of the code of language that was being used.

Transcript of Proceedings of October 15, 1974, in United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 75-76, 170. A copy of the transcript is included in the original record in this Court.

sale of narcotics. Scott II found "that [the telephones] were not entitled to the same extent of protection as would be afforded in the case of telephones used primarily for lawful purposes." 516 F.2d at 759. Yet, the telephone here was primarily used for lawful purposes. The district court concluded that the telephone was "not the type of 'business' phone as was used in James." ⁶³

iii) Government Expectation Of The Contents Of The Calls.

James stated that the Government's expectation of the contents of the calls is a factor to be considered in determining the degree of minimization required. For instance, if an agent knows the identities of those suspected or the times frequently used to transact "business", the agent can tailor minimization efforts to avoid monitoring non-pertinent calls. James noted that while "[t]hese considerations affect the initial minimization tactics employed by the government," 494 F.2d at 1020, they also are directed to the agents' minimization policy during the wiretap, as categories of innocent communications develop. Id. at 1020-1021.

The court in Scott II adopted this notion that the degree of minimization required may change in accordance with the information revealed by the ongoing wiretap:

Thus the only feasible approach to minimization is the gradual development, during the execution of a particular wiretap order, of categories of calls which most likely will not produce information relevant to the investigation. Once the monitoring agents have sufficient data to conclude that a particular type of conversation is unrelated to the criminal investigation, the minimization requirement obliges them to avoid intercepting future conversations as soon as they can determine that it falls within that category. Until such categories become reasonably apparent, however, interception of all calls will be justified under the wiretap authorization. 516 F.2d at 754-755 (footnote omitted).

Thus Scott II conceded that, while total interception is reason-

⁶³ Findings of Fact, Conclusions of Law and Order, United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 3. See the Addendum to this Brief, infra, at III.

able where the surveillance does not reveal patterns of innocent conversations, once those patterns develop minimization is required. ⁶⁴ See also United States v. Quintana, 508 F.2d at 874 (7th Cir. 1975).

In the instant case, certain patterns did develop, yet the agents made no adjustments whatever of their policy of total interception. The district court in its first suppression opinion noted that

there comes a time when an officer should reasonably assume that a particular conversation does not involve drugs. The conversations between Geneva and her mother serve as the most blatant examples of this. 331 F.Supp. at 247-48.

During the period of the wiretap, the agents intercepted in their entirety seven calls between Geneva Jenkins, a suspected conspirator, and her mother. The conversations usually entailed several pages of transcript and afforded ample opportunity for appropriate adjustment by the agents. However, while the wiretap revealed that the mother was not involved in the conspiracy, ⁶⁵ the

⁶⁴ The instant case presented a situation where categories of nonpertinent calls were apparent at the outset of the surveillance. The district court noted:

For example, the intercept transcript at page 47 shows a call from Riggs National Bank to Thurmon seeking to verify a signature on a check; at pages 148-150 shows a conversation between Geneva and another female about a possible job opening and Geneva's qualifications for it; and at page 280 a call to the Weather Bureau and the response. It is common knowledge that when one calls for a weather report he will get a tape recorded response. 331 F.Supp. at 247.

⁶⁵ Q. [Mr. Palmer] And you never had any single piece of information, did you, that the mother was involved in any way with this illicit dealing in narcotic drugs, did you?

A. [Agent Cooper] No, we did not.

Transcript of Proceedings of April 16, 1971, in United States v. Scott, et al., Crim. No. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 325. A copy of the transcript is included in the original record in this Court.

agents made no attempt to minimize these conversations.⁶⁶ This pattern had clearly developed by the time Miss Jenkins and her mother were talking for about the fourth or fifth time, yet the agents, despite their admitted awareness of this "category,"⁶⁷ continued total interception.⁶⁸

Other patterns were also evident.⁶⁹ As early as the fifth day of the surveillance, it became apparent that the period of time from midnight to six a.m. was rarely used to conduct "business" and that the agents were aware of this fact. Still no consideration was given to reducing the operation of the wiretap.⁷⁰

Another pattern was lawyer-client communications. The Government's plan in connection with those calls perhaps best reveals how lightly it regarded the statutory minimization requirement. The agents were instructed to cease monitoring these conversations if they were determined to be privileged. While this is the only instance where the agents developed a plan in

⁶⁶. Id. at 350, 353.

⁶⁷. Id. at 356.

⁶⁸. Scott II admits that had this pattern been more fully developed, "the agents could no longer have had a reasonable expectation of discovering material evidence and thus should have acted to minimize the interceptions." 516 F.2d at 758. To postpone minimization on the merest chance that a conversation will turn to a pertinent subject would make the requirement meaningless. See United States v. King, 335 F.Supp. at 543.

⁶⁹. It has already been noted that the interception revealed a local retail operation instead of the anticipated interstate importation and distribution enterprise. Even assuming the propriety of total interception with the expectation of the latter, it follows that the subsequent discovery of a smaller conspiracy would require a greater degree of minimization.

⁷⁰. Transcript of Proceedings of October 15, 1974, in United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at pp. 192-98. A copy of the transcript is included in the original record in this Court.

advance to minimize, the procedure to be employed was so cumbersome as to be meaningless. It required the monitoring agents to continue interception of the suspected privileged call until Assistant United States Attorney Harold J. Sullivan could be contacted. Only when Sullivan determined that the conversation was between lawyer and client, discussing the case under investigation, would interception cease. It appears that surveillance would continue unabated if the lawyer-client conversation related to a matter not connected to the case under investigation.⁷¹ Such a procedure creates the precise evil that § 2518(5) is designed to remedy, i.e., the interception of unrelated communications.

Despite the development of patterns of innocent communications and the agents' awareness of those patterns, there was no adjustment whatsoever of the minimization policy. The entire surveillance entailed 100% interception. Such conduct is patently unreasonable and demonstrates the Government's blatant disregard of the minimization requirement.

iv) Judicial Supervision By The Authorizing Judge.

James states that "[t]he most striking feature of Title III is its reliance upon a judicial officer to supervise wiretap operations." 494 F.2d at 1021.⁷² Of the four criteria stated in James, the degree of judicial supervision is most often relied upon by the courts in finding reasonable compliance with minimization provision. The effect of that supervision is to force agents on a continuing basis to conform their actions to the law. See United States v. Bynum, 360 F.Supp. at 410. Moreover, where the

⁷¹. Transcript of Proceedings of April 16, 1971, in United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 308. A copy of the transcript is included in the original record in this Court.

⁷². The fundamental importance of judicial scrutiny within the Title III context is demonstrated by Congress' expressed intent to conform that statute to the principles enunciated in Katz v. United States. See supra, at p. 16 n.12. In Katz, this Court found that the surveillance violated the fourth amendment despite its narrow limits. The decision was based on the lack of a neutral predetermination by a judicial officer. Minimization cases, like Katz, emphasize the essential protection afforded by judicial supervision. See e.g., United States v. Bynum, 360 F. Supp. 400 (S.D.N.Y.), aff'd, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974).

authorizing judge required and reviewed interim reports,⁷³ courts have been more willing to find a good faith attempt to minimize unnecessary interceptions. United States v. Clerkley, 556 F.2d at 718; United States v. Quintana, 508 F.2d at 875; United States v. Focarile, 340 F.Supp. at 1048.

Judicial supervision necessarily contemplates full awareness and understanding by the judicial officer of the nature and scope of and parties to the conspiracy. Absent complete knowledge of the investigation, the protection afforded by judicial supervision is impossible.⁷⁴ The trial court in Scott found:

9. That according to the reports and classifications of the monitoring agents that were ultimately submitted to Judge Smith 40% of the intercepted calls were narcotic related and 60% were not narcotic related. Judge Smith was never informed that the agents were making no attempt to minimize. (emphasis supplied).⁷⁵

The reports submitted to Judge Smith revealed no more than the total number of communications per day and the number of those that were narcotic related. The reports contained some highlights, "but none of them revealed that the agents were listening to and recording in full and indiscriminately all conversations passing through the subject telephone." Scott, 331 F.Supp. at 248. Further, it may well be that the Government's failure to indicate in its report the actual scope of the criminal enterprise under investigation, resulted in judicial supervision geared to an investigation of greater

⁷³ 18 U.S.C. § 2518(6) authorizes the judge to require that reports be submitted to him periodically showing progress and justifying the need for continued interception.

⁷⁴ See United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974); United States v. Turner, 528 F.2d 143 (9th Cir.), cert. denied, 423 U.S. 996 (1975).

⁷⁵ Findings of Fact, Conclusions of Law and Order, United States v. Scott, et al., Crim. Nos. 1088-70 and 1089-70 (United States District Court for the District of Columbia) at 4. See the Addendum to this Brief, infra, at IV.

complexity.⁷⁶ As a result Judge Smith was unable to provide the judicial supervision contemplated by James and similar cases.

In summary the fact that every conversation is intercepted does not necessarily render the surveillance violative of § 2518 (5). See United States v. Armocida, 515 F.2d at 42-43; United States v. Bynum, 485 F.2d at 500. However, the analysis required by James of the factors relevant to assessing compliance with § 2518(5) clearly indicates that 100 percent interception was not justified in the instant case, and that the Government did not do all that it could to avoid unnecessary intrusion. Even if this Court finds that the intentional flouting of the statutory command by the executing agents was not unreasonable per se, Daviage contends that total interception, under the circumstances, was a violation of the minimization requirement.

III. BECAUSE THE GOVERNMENT MADE NO GOOD FAITH ATTEMPT TO ABIDE BY THE MINIMIZATION REQUIREMENTS, THIS CASE IS AN APPROPRIATE ONE IN WHICH TO INVOKE THE SANCTION OF COMPLETE SUPPRESSION.

In neither Scott I nor Scott II did the court of appeals find a breach of the minimization provision. Consequently, neither of those opinions had addressed to reach the remedy issue. Nevertheless, the court in Scott II, in an extensive footnote, 516 F.2d at 760 n. 19, suggests that had it reached the issue, it would have ruled in favor of suppression of only the non-relevant conversations. The district court, however, held that the minimization violation demanded suppression of the entire intercept. The remedy issue is very much alive in the instant case, as well as a subject of controversy throughout federal and state jurisdictions. Notions of judicial economy call for this Court to determine appropriate guidelines.

⁷⁶ It is unclear from the record whether Judge Smith was ever made aware of the proper conspiracy under investigation. The conspiracy revealed by the intercept, i.e., local, intra-Washington sales, was of an admittedly lesser scope than that anticipated. The affidavits for the original tap and for the extension, emphasized the international, interstate conspiracy. See Affidavits of Glennon L. Cooper, dated January 24, 1970 and February 4, 1970, respectively. Copies of the Affidavits are included in the original record in this Court.

A. The Statutory Suppression Mechanism.

The Government made no effort to adhere to the judicially authorized wiretap order. For this reason, the entire intercept should be suppressed. This result is supported by the statutory exclusionary mechanism codified in 18 U.S.C. § 2515, as well as by case law and the traditional rationale underlying the judicially-created exclusionary rule.

Section 2515 provides, in pertinent part:⁷⁷

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received into evidence in any trial...if the disclosure of that information would be in violation of this chapter.

This section is the statutory remedy for the right provided in § 2518(10)(a).⁷⁸ This latter section provides that an aggrieved person⁷⁹ may invoke the suppression sanction if "the interception was not made in conformity with the order of authorization or approval." Section 2518(10)(a) further states:⁸⁰

If the motion [to suppress] is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom shall be treated as having been obtained in violation of this chapter.

The language of § 2518(10)(a) indicates, therefore, that upon proving that the monitoring agents failed to comport with the provisions of the judicial order of approval, the aggrieved person may invoke the explicit suppression remedy of § 2515.⁸¹

⁷⁷. The entire text of § 2515 is quoted supra, at p. 3.

⁷⁸. See S. Rep. No. 1097, supra, 106, reprinted in 1968 U.S. Code Cong. & Ad. News at 2195.

⁷⁹. See discussion supra, at pp. 10-21.

⁸⁰. The entire text of § 2518(10)(a) is quoted supra, at 4.

⁸¹. The legislative history highlights the close interplay between §§ 2515 and 2518(10)(a):

[Section 2515] must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. * * *

This provision [§ 2518(10)(a)] must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515.

S. Rep. No. 1097, supra, 96, 106, reprinted in 1968 U.S. Code Cong. & Ad. News at 2185, 2195.

B. The Government's Suppression Remedy Is Inadequate.

Insofar as the Government's position can be gleaned from its briefs filed in prior stages of this litigation,⁸² it apparently urges that only the "innocent" conversations should be "suppressed". Its position presumably rests on an analogy to the doctrine of the over-extended search in cases involving traditional search and seizure of tangible items. See Marron v. United States, 275 U.S. 192 (1927), and United States v. Thweatt, 483 F.2d 1226 (D.C.Cir. 1970). This argument states that evidence seized other than that specified in the warrant itself should be suppressed, but that evidence gained by that part of the search conducted appropriately or evidence which falls within a recognized exception, e.g., the "hot pursuit" exception, Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967), is nevertheless admissible. This approach was taken in three cases involving minimization violations. United States v. King, 335 F. Supp. 523, 543-44 (S.D. Cal. 1971) rev'd. on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974); United States v. Sisca, 361 F. Supp. 735, 746-47 (S.D. N.Y. 1973); and United States v. Cox, 462 F.2d 1293 (8th Cir. 1973), cert. denied, 417 U.S. 918 (1974).

The Government's analogy between the search and seizure of tangible items and the monitoring of a conversation overlooks several critical distinctions. Electronic surveillance is a much more intrusive mechanism than is a traditional search and seizure. The latter involves the taking of an item with the resulting invasion of privacy. This invasion, however, can be at least partially corrected by return of the items wrongfully seized. The seizure of a conversation, however, is irrevocable. As the court in United

⁸². See, e.g., the Government's Brief in Scott I (Nos. 71-1702 and 71-1703, United States Court of Appeals for the District of Columbia); and the Government's Motion for Summary Reversal in Scott II (Nos. 70-2097 and 70-2098, United States Court of Appeals for the District of Columbia) (by order of March 5, 1975, the Court of Appeals directed that the motion be treated as the Government's Brief).

States v. Focarile, 340 F. Supp. at 1047, noted:

A conversation once seized can never truly be given back as can a physical object. The right of privacy protected by the Fourth Amendment has been more invaded where a conversation which can never be returned has been seized....

This distinction was also recognized in United States v. King, 335 F. Supp. at 544.

It is possible that the great delicacy which inheres in a wiretap situation sets it so far apart from other types of searches and seizures that error as to the conduct of a part of the surveillance renders the entire interception invalid.

Moreover, in a typical search, the authorities do not seize "innocent" items. Whether the executing officers stay within the particulars of a warrant or not, only inculpatory items are taken. The same cannot be said of electronic surveillance. Indeed, at its core, a wiretap constitutes a complete survey and a total intrusion into the target individual's life. Whereas a typical search warrant specifically defines the area to be searched and the items to be seized, a wiretap order, by its very nature, permits seizure of everything.⁸³ In fact, the whole point of minimization is to prevent a general inquiry into a person's life and to inject some particularity into an inherently intrusive mechanism. The failure to adhere to the minimization requirement does not go to any single interception; rather it goes to the conduct of the monitoring agents over the entire span of the wiretap. If the agents fail to minimize, then it is the complete life of the wiretap that is infected.

Furthermore, the remedy of exclusion of the improperly seized items, while meaningful in a traditional search case, is no remedy at all in a wiretap case. In the former situation, the exclusion

⁸³ This is particularly true in view of § 2517(5) which permits the executing agents to receive after-the-fact judicial orders to justify the monitoring and recording of inculpatory conversations unrelated to the purpose of the original wiretap order.

of the improperly seized items punishes the over-reaching law enforcement officer by denying him the use of evidence that tends to establish the defendant's guilt. In the wiretap situation, however, the evidence unlawfully seized is non-inculpatory or, at a minimum, wholly irrelevant to the purpose of the wiretap. Thus, the remedy suggested by the Government is no remedy at all, since it permits the use of inculpatory material while "conceding" that the material gained as a direct result of an unlawful invasion of privacy should be "suppressed". The Government conveniently overlooks the fact that no one would ever seek to introduce the innocent calls; indeed their introduction would be objected to on relevancy grounds. The district court correctly noted that such an approach to exclusion would gut § 2518(5):

If this Court were to allow the Government agents to indiscriminately intercept every conversation made and to continue monitoring such calls when it becomes clear that they are not related to the "authorized objectives" of the wiretap and in violation of the limiting provisions of the order such order would become meaningless verbiage and the protections to the right of privacy outlined in Berger and Katz would be illusory. 331 F.Supp. at 248.

C. The Policy Underlying 18 U.S.C. § 2515 Warrants Suppression Of The Entire Intercept.

Daviage urges this Court to suppress the entire wiretap evidence. Such a remedy for a minimization violation does not require any extension of existing exclusionary principles, but does recognize the unique nature of electronic surveillance. Unlike the Government's position, which would permit virtually unlimited surveillance with "suppression" of items totally irrelevant, this remedy is consistent with the legislative mandate of protecting privacy found in Title III.

The legislative history makes abundantly clear the crucial role of the evidentiary sanctions in insuring that the privacy of individuals is respected. After setting out the specific provisions of § 2515, the Senate Committee report states:

It largely reflects existing law. It applies to suppress evidence directly (Nardone v. United States, 302 U.S. 379 (1937)) or indirectly obtained in violation of this chapter. (Nardone v. United States, 308 U.S. 338 (1939)).

There is, however, no intention to change the attenuation rule. See Nardone v. United States, 127 F.2d 521 (2d), certiorari denied, 316 U.S. 698 (1942); Wong Sun v. United States, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression rule beyond present search and seizure law. See Walder v. United States, 347 U.S. 62 (1954). But it does apply across the board in both Federal and State proceeding. Compare Schwartz v. Texas, 344 U.S. 199 (1952). And it is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. Compare Adams v. Maryland, 347 U.S. 179 (1954); Mapp v. Ohio, 367 U.S. 643 (1969). The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications. S. Rep. No. 1097, supra, 96, reprinted in 1968 U.S. Code Cong. & Ad. News at 2185.

An examination of the cases relied on in the committee report confirms that the drafters of § 2515 intended to incorporate into the statute principles generally supportive of the suppression position urged by Daviage. The two Nardone cases are cited for the basic proposition that illegally seized evidence is inadmissible, Nardone v. United States, 302 U.S. 379, (1937), as well as evidence obtained solely by information derived from illegal seizure, Nardone v. United States, 308 U.S. 338 (1939). The "attenuation rule" for which Nardone v. United States, 127 F.2d 521 (2d Cir), cert. denied, 316 U.S. 698 (1942), and Wong Sun v. United States, 371 U.S. 471 (1963), are cited bears solely on the extent to which indirect evidence gained from information received from an illegal search or seizure can be used and is not an issue in the instant case. The report further cites Walder v. United States, 347 U.S. 62 (1954) for the proposition that the scope of suppression called for in § 2515 is not to exceed present limits. Walder permits illegally seized information to be used for impeachment purposes at trial - a proposition clearly irrelevant to the matter now before the Court. Schwartz v. Texas, 344 U.S. 199 (1952), Adams v. Maryland, 347 U.S. 179 (1954), and Mapp v. Ohio, 367 U.S. 643 (1961), are all cited to support wide ranging scope intended for this rule. That is, the

exclusionary principle is to be applied in virtually all kinds of judicial or quasi-judicial proceedings in both state and federal jurisdictions.

In Gelbard v. United States, 408 U.S. 41 (1972), this Court stressed the importance that Congress attributed to the § 2515 statutory sanction.⁸⁴ The Court noted that the fundamental policy of Title III was to limit permissible electronic surveillance in a manner designed to afford great protection for privacy. Id. at 50. The Court went on to say that § 2515 is crucial to this protection:

The unequivocal language of § 2515 expresses the fundamental policy adopted by Congress on the subject of wire-tapping and electronic surveillance. As the congressional findings for Title III make plain, that policy is strictly to limit the employment of those techniques of acquiring information....

* * *

Section 2515 is thus central to the legislative scheme. Its importance as a protection for "the victim of an unlawful invasion of privacy" could not be more clear. The purpose of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored.... 408 U.S. at 49-51 (footnote omitted).

As well as implementing and protecting the privacy safeguards, § 2515 serves the traditional policies underlying the judicially fashioned exclusionary rule. As originally set forth in Weeks v. United States, 232 U.S. 383 (1914), the judicially established exclusionary rule prohibits the use of otherwise competent evidence when that evidence was seized in violation of the fourth amendment. The purpose of this policy is primarily to deter unlawful police conduct, Mapp v. Ohio, supra, and further, to insure that the courts "do not become partners to illegal conduct" Gelbard, 408 U.S. at 51.

⁸⁴ The petitioners in Gelbard had refused to answer questions based upon intercepted telephone conversations to which they had been parties until they had received an opportunity to challenge the legality of the wiretap. As a result of the refusal to testify, the petitioners had been cited for civil contempt. The Court held that witnesses were entitled to invoke the prohibition of § 2515 as a defense to contempt charges.

The instant case is one in which suppression of the entire intercept serves the policies underlying § 2515 particularly well. The minimization provision of § 2518(5) would be rendered meaningless if the agents executing a wiretap were permitted to purposely disregard that directive and conduct a wholesale search. Moreover, were the Government to benefit from such wiretapping conduct, there would be no incentive for the monitoring agents ever to abide by the minimization requirement. Any deterrent effect of § 2515 would be neutralized. Finally, permitting the use in court of wiretap evidence seized in flagrant disregard of the wiretap order would constitute judicial approval of such wiretapping methods.

D. The Minimization Requirement Of 18 U.S.C. § 2518(5) Plays A Central Role In Enforcing The Privacy Requirements Of Title III.

Although this Court has not yet construed the minimization provisions of Title III, its decisions interpreting other provisions of that statute strengthen Daviague's contention that minimization is central to the statutory scheme and should be made meaningful through invocation of the remedy of total suppression. Thus, in United States v. Giordano, 416 U.S. 505 (1974), this Court was confronted with an argument similar to the one now urged by the Government. In Giordano, the Government violated § 2516(1) which required the Attorney General or a specially designated Assistant Attorney General to authorize all wiretaps. Then Attorney General Mitchell had delegated this responsibility to his Executive Assistant. The Government admitted violating § 2516(1) but argued that the violation was only technical and did not require suppression of the interception. This Court held that, in attempting to balance law enforcement needs against the intrusiveness of electronic surveillance, Congress specifically intended only Senior Justice Department officials to have authorization power. Hence, departure from the statutory scheme constituted too great an encroachment on "the Congressional intention to limit the use of intercept procedures...." 416 U.S. at 527. In reaching this decision to suppress the illegally seized wiretap evidence Mr.

Justice White stated:

We think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. Id. at 527.⁸⁵

United States v. Donovan, 429 U.S. 413 (1977) is the Court's most recent statement interpreting Title III's suppression remedy.⁸⁶ Building on Giordano, the Court stated that suppression of the entire intercept is appropriate where the Government violates a section of Title III that plays "a 'central role' in the statutory framework." Id. at 434.

Daviague contends that the minimization requirement plays as central a role in the statutory scheme as did the provision discussed in Giordano. It is, in fact, crucial in preventing a wiretap from becoming a general search. In Berger v. New York, supra, this Court struck down a New York electronic surveillance law, in part, because that statute permitted

a long and continuous (24 hour a day) period [during which] the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection to the crime under investigation. 388 U.S. at 59.

^{85.}

Giordano's companion case, United States v. Chavez, 416 U.S. 562 (1974), held that where the proper Justice Department official authorized the intercept, but that official was later misidentified as one without statutory authorization power, the error was not significant enough to warrant suppression. The Court determined that the Chavez violation was merely technical, and not every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communication "unlawful." 416 U.S. at 574-75.

^{86.}

In Donovan, the Government violated Title III by failing to inform the approving judge of 1) all of the principal targets of the wiretap as required by § 2518(1)(b)(iv); and 2) all people whose conversations were intercepted for the purpose of sending the post-wiretap notice as required by § 2518(8)(d). The Court held that both of these omissions violated Title III, but that the violations were not significant enough to warrant suppression. The Court suggested, however, that had the violations been willful or deliberate a very different result might well have followed. Id. at 436, n. 23. See also United States v. DiGirolomo, 550 F.2d 404 (8th Cir. 1977).

Recognizing both the particular intrusiveness of electronic surveillance and its potential for extreme invasion of privacy, Congress attempted to limit the extent of permissible wiretapping. Indeed, Congress explicitly sought to make Title III conform to the limits explicated in Berger and Katz. See p.16 n 12 , supra. The minimization provision goes to the core of Title III insofar as it prevents blanket searches or seizures and attempts to implement the particularity requirement of the fourth amendment. See S. Rep. No. 1097, 103, reprinted in 1968 U.S. Code Cong. & Ad. News at 2192. Were it not for the minimization requirement, law enforcement officials would be permitted to conduct twenty-four hour searches and seizures of private conversations. No one would argue that the Government could seek all papers which a person will write for the next thirty days. Such a request would undoubtedly be denied as constituting a general warrant. Camara v. Municipal Court, 387 U.S. 523 (1967). It is, however, even more extreme for the Government to seize all conversations for a future period. Title III attempts to carefully balance the competing interests of efficient law enforcement and preservation of individual privacy. The minimization provision is central in preventing the scales from tipping too far on the side of electronic intrusion at the expense of personal privacy.

E. Failure To Comply With The Minimization Provision Of 18 U.S.C. § 2518(5) Requires Suppression Of The Entire Intercept.

Although minimization issues have been subjected to considerable scrutiny by the courts, few opinions have dealt extensively with the issue of remedy. Perhaps the most detailed discussion of the appropriate remedy for a failure to minimize is found in United States v. Focarile,⁸⁷ supra, in which the United States District Court for the District of Maryland analyzed the two

⁸⁷ Focarile is the district court case which, on appeal, became United States v. Giordano, supra. At the district court level, the issue of improper Justice Department authorization had not yet emerged. Once that issue did appear, however, it pre-empted the minimization issue.

basic kinds of minimization violation. It described a Type I violation as one in which government agents - as in the instant case - consciously disregard the minimization provision. A Type II violation, on the other hand, arises when the agents attempt to minimize but their efforts are unreasonably inadequate. 340 F. Supp. at 1046.⁸⁸ The court went on to say, however, that regardless of the type of minimization violation, the appropriate remedy was suppression of the entire intercepted communication. It rested this analysis squarely on the rationale of effective enforcement of the minimization requirement:

In either type of violation of the minimization requirement, a question necessarily arises as to the extent of the prophylactic remedies necessary to give the requirement meaning. In this Court's opinion the minimization requirement of § 2518(5) would be illusory if it were enforced on an item-by-item basis by means of suppressing unauthorized seizures at trial after the interception is a fait accompli. Id.

Daviage urges that this Court adopt the reasoning of Focarile, and rule that either a Type I or Type II violation of the minimization requirement results in the suppression of the entire intercept.

Because the minimization provision plays such a significant role in protecting individuals from unreasonably broad electronic surveillance, logic and fairness require giving full effect to that safeguard.

⁸⁸ The specific facts of Focarile presented the possibility of a Type II violation, i.e. where the agents' efforts at minimization were unreasonably inadequate. The court went on to rule, however, that there was a good faith effort to comply coupled with actual compliance and hence, no violation.

The Focarile position presently represents the minority viewpoint, with most courts agreeing to suppress only when a Type I violation has occurred. Nevertheless, should this Court adopt the majority position, the result in the instant case would be the same - suppression of all the wiretap evidence. The majority position⁸⁹ is a two-step process,⁹⁰ turning on the same distinction drawn by Focarile. If the violation of the minimization provision in the order of approval is conscious and deliberate, as in the present case, then total suppression of the entire intercept is appropriate. If, however, the violation is one in which the agents attempted to minimize but inadequately implemented those efforts, then suppression is limited to those interceptions beyond the scope of the wiretap order. An examination of several cases which have applied this two-step process in differing factual contexts is instructive.

In United States v. George, 405 F.2d 772 (6th Cir. 1972), the court faced a factual situation nearly identical to the instant one. The monitoring agents were not supplied with a copy of the wiretap order. Without the order or any other special instructions, the protective limitations contained in the order were entirely circumvented and, as a result, the agents intercepted conversations outside the permissible scope of the authorization. The court found that the surveillance had been conducted in "utter disregard of the provisions of the order of the District Court." Id. at 774. In

⁸⁹. See United States v. Lanza, 349 F.Supp. 929 (M.D.Fla. 1972); United States v. Leta, 332 F. Supp. 1357 (M.D.Pa. 1971), rev'd on other grounds sub nom, United States v. Cerasco, 467 F.2d 647 (3rd Cir. 1973); United States v. King, supra; United States v. Curreri, 363 F. Supp. 430 (D.Md. 1973); United States v. Tortorello, 480 F.2d 764 (2nd Cir.), cert. denied, 414 U.S. 866 (1973); United States v. Turner, 528 F.2d 143 (9th Cir.), cert. denied, 423 U.S. 996 (1975); United States v. Principie, 531 F.2d 1132 (2nd Cir. 1976), cert. denied, 430 U.S. 905 (1977); Cf. United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974); United States v. Sisca, 361 F. Supp. 735 (S.D.N.Y. 1972), aff'd, 503 F.2d 1337 (2nd Cir.), cert. denied, 419 U.S. 1008 (1974).

⁹⁰. This two-step approach to suppression closely parallels and complements the two-step method of deciding the actual merits of a minimization claim. See supra, at p. 30.

suppressing the entire intercept, the court stated:

If the agents of the Government are not required to comply with the limitations contained in an order authorizing interception of telephone calls then the purpose of such order would be defeated.... Id. at 775.

In People v. Brenes, 42 N.Y.2d 41, 396 N.Y.S.2d 629 (1977), the Court of Appeals of New York articulated the two-step approach in formulating a remedy for a minimization violation under New York's wiretap law.⁹¹ In Brenes, as in the instant matter, every conversation totalling 743 in all, was recorded over the course of twenty days. There were no advance procedures worked out for minimizing and no attempt to minimize was made. The court declined to state a "blanket" suppression rule, People v. Brenes, supra, at 635, but went on to say that

a distinction must be drawn between, on the one hand, cases where, as here, the order is executed as if in defiance of the existence of statutory and decisional minimization requirements and, on the other, cases where in retrospect it appears that the minimization efforts have merely fallen short. While an unlimited intrusion requires a remedy as broad as the unlawful act, a limited one may not. Since, in our view, the present case falls within the first category, total suppression was warranted. Id. at 635 (emphasis supplied).⁹²

In several other cases where the courts found substantial compliance and therefore did not suppress, they nevertheless made clear that suppression would have been appropriate if lack of good faith had been demonstrated. For example, in United States v. Lanza, 349 F. Supp. 929 (M.D.Fla. 1972), the court found that of the 4,098 calls intercepted, only 1,066 (26%) constituted

⁹¹.

See supra, at p. 34 n.41.

⁹².

See also People v. Holder, 69 Misc. 2d 863, 331 N.Y.S.2d 557 (Sup. Ct. of Nassau Cty. 1972) holding that failure by the monitoring agents even to attempt "lip service" compliance with the minimization provision requires suppression of the entire intercept.

recorded non-pertinent calls.⁹³ The court decided that these statistics, combined with the fact that the agents, in fact, made reasonable efforts to minimize, 349 F. Supp. at 932, indicated that there had been no minimization violation. In reaching its decision, the court contrasted the facts in Lanza with those in the instant case:

The statute does not prohibit the interception of non-pertinent calls; rather it requires the agents to conduct the wiretap so as to minimize such interception. When, as in Scott, this mandate is so blatantly ignored, the proper result is the suppression of the entire intercept. On the other hand, where non-pertinent calls are intercepted despite the agents' effort at minimization, only the unauthorized interceptions should be suppressed. Id. at 932.

See also United States v. Curreri, 363 F.Supp. at 437 ("If the government totally ignores the minimization directive, total suppression may well be in order."); United States v. Turner, 528 F.2d at 156 ("In a case where it is clear that the minimization provision...was disregarded by the Government...total suppression might well be appropriate."); United States v. Leta, 332 F.Supp. at 1360 n.4.⁹⁴

This two-step approach, keying on the good faith of the agents is consistent with cases construing other provisions of Title III. United States v. Eastman, 465 F.2d 1057 (3rd Cir. 1972), dealt with the failure of the monitoring authorities to provide an inventory to the subject of the wiretap, such failure being in

93.

These figures should be contrasted with a finding by the district court in the instant case that indicated that approximately 60% of the intercept was non-pertinent. See United States v. Scott, 331 F. Supp. at 247.

94. The Leta court suggested that bad faith on the part of the government not only requires complete suppression pursuant to § 2515, but may well require suppression under the judicial exclusionary rule as a constitutional violation:

However, it may also be that 100% recording will take place without an effort to minimize where possible. In such a violation, 18 U.S.C. § 2518(5) will have been violated, and it would appear that under 18 U.S.C. § 2518(10), as well as the Fourth Amendment, all the seized conversations would have to be excluded from use by the government. Id.

violation of § 2518(8)(d). In Eastman, the judge who approved the tap deliberately ordered that no inventory be provided. In ruling that all of the wiretap evidence must be suppressed, the court of appeals stated:

The touchstone of our decision on this aspect of the case at bar is not one in which an inventory was delayed but rather is one in which specific provisions of Title III were deliberately and advertently not followed. In other words the failure to file the notice or inventory is not mere ministerial act. It resulted from a judicial act which on its face deliberately flouted and denigrated the provisions of Title III designated for the protection of the public. This we cannot countenance. 465 F.2d at 1062.

This Court itself has suggested distinguishing a remedy based upon the good faith of the agents. In United States v. Donovan, 429 U.S. 413 (1977), the Court held that the Government violated Title III. Despite these violations, the court held that suppression was not required. Nonetheless, the Court did suggest that a finding that the government acted in bad faith may well have mandated a different result:

There is no suggestion in this case that the Government agents knowingly failed to identify respondents Donovan, Robbins, and Buzzaco for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case. 429 U.S. at 436 n. 23 (emphasis supplied).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court reverse the judgment of the Court of Appeals.

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November, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

I.

UNITED STATES OF AMERICA)
)
 vs.)
)
 FRANK R. SCOTT, et al.)
)
 and)
)
 UNITED STATES OF AMERICA)
)
 vs.)
)
 BERNIS L. THURMON, et al.)
)
)

Criminal No. 1088-70

FILED

NOV 12 1974

JAMES F. DAVEY, Clerk

Criminal No. 1089-70

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

This cause is before the Court on remand from the United States Court of Appeals for the District of Columbia Circuit, directing this Court to reexamine the minimization issue in the light of James (United States v. James, 494 F.2d 1007 (1974)) and for further proceedings consistent with its order of remand. It directed the Court to "...accept the 'call analysis' and any other evidence that might appear to be of assistance in the resolution of this complicated minimization question. And, after assuring itself of the validity of the evidentiary offerings, it should again assess the reasonableness of the agents' conduct in light of James and the comments contained therein."

In compliance with the Remand Order of the Court of Appeals this Court held evidentiary hearings

ADDENDUM

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on October 15, 16, 17 and 18. It received into evidence the "call analysis" made by former Assistant U. S. Attorney Phillip Kellogg, the daily reports of the listening agents as compiled by the supervising agent; the reports of the supervising agent to Harold J. Sullivan, the Assistant U. S. Attorney in charge of the investigation, and the periodic reports of Mr. Sullivan to Judge Smith. Oral testimony was given by Special Agent Glennon L. Cooper, who was in charge of the investigation, by Mr. Kellogg, who prepared the "call analysis" and others. The Court also reexamined the entire transcript of the hearings conducted in April, 1971, and heard arguments of counsel.

Based upon the foregoing reexamination this Court finds:

1. That Title 18, Section 2518(5) of the United States Code requires that

"(E)very order and extension thereof shall contain a provision that the authorization to intercept ... shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter..."

2. That the orders and extension of Judge Smith authorizing the interceptions in this case contained the direction to the agents manning the tap that was required by Title 18, Section 2518(5).

3. That Special Agent Cooper and the monitoring agents knew that the Statute and the authorization required such minimization.

4. That the monitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the Jenkins telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion.

5. That the telephones for which the interceptions were authorized by Judge Smith were located in residences, and were not the type of "business" phone as was used in James.

6. That the monitoring agents made daily reports of all calls intercepted and classified them as to whether they were narcotic related or not narcotic related.

7. That these daily reports and classifications were turned over to Mr. Sullivan and Mr. Sullivan presented the information and classifications contained in these reports to Judge Smith without modification.

8. That the intercept revealed that the criminal operation under investigation was of lesser dimension than was originally anticipated.

IV.

9. That according to the reports and classifications of the monitoring agents that were ultimately submitted to Judge Smith 40% of the intercepted calls were narcotic related and 60% were not narcotic related. Judge Smith was never informed that the agents were making no attempt to minimize.

10. That at the hearings in April, 1971, Special Agent Glennon L. Cooper testified under oath that the telephone calls fell into the classifications mentioned in Paragraph 9 above. He also testified that he and the agents working under him knew of the minimization requirement but made no attempt to comply therewith. At the hearing on remand Agent Cooper repeated that testimony as follows:

BY THE COURT:

Q Agent Cooper, at a hearing -- at a prior hearing, you have testified that you were the supervising agent of the intercept which was placed upon the N Street number and the other two numbers, am I correct?

A That is correct, Your Honor.

Q And also that there were times when you, yourself, did the listening?

A That's correct.

Q The question I wish to ask you is this, whether at any time during the course of the wiretap -- of the intercept, what if any steps were taken by you or any agent under you to minimize the listening?

V.

A Well, as I believe I mentioned before, I would have to say that the only effective steps taken by us to curtail the reception of conversations was in that instance where the line was connected to -- misconnected from the correct line and connected to an improper line. We discontinued at that time.

Q Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number?

A That i. correct, Your Honor.

11. After hearing testimony of Agent Cooper in April, 1971, after the Court had entered an order suppressing the evidence gathered by reason of the admitted failure to even attempt to comply with the Statute and the minimization order, the Assistant U. S. Attorney then in charge of the case made the "call analysis" and filed a motion to reconsider.

12. The "call analysis" was made by Mr. Kellogg in his capacity as an advocate without consultation with any federal narcotics agent and the categories were not shown to, looked at or validated by any such agent as "actual and realistic categories for agents to use in manning a wiretap." Mr. Kellogg described the "call analysis" as "...purely and simply an after-the-fact analysis, designed to provide the Court with a means of factually analyzing the conduct of the agents. It was not in an effort to infer, or assert that the agents followed these relatively sophisticated delinquencies in the course of the intercept. They did no[t]

insofar as I understand." Tr. Hearing on Remand, p. 436.

(Underscoring supplied).

VI.

12. The "call analysis" conflicts with the reports and characterizations of the intercepted calls as made and determined by the monitoring agents whose conduct is controlling in this case.

13. An examination of the totality of the conduct of the monitoring agents in this case during the duration of the authorized interception reveals a knowing and purposeful failure to comply with or even attempt to comply with the minimization requirements of the statute and the order of authorization.

14. During the period of the intercepts there were conversations between persons at the Jenkins intercept and others at the Linnean Avenue intercepts. On occasion these communications revealed information and set in motion other conduct and types of surveillance that would not otherwise have been known or undertaken by the investigators.

CONCLUSIONS OF LAW AND ORDER

1. The Statute in this case imposes an absolute ban on electronic surveillance except under circumstances authorized by specific procedures which are not mere technical steps. United States v. Giordano, 469 F.2d 522, affirmed, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (May 13, 1974).

2. Title 18, Section 2518(10)(a)(iii) provides for the suppression of "...the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that -- ...that the interception was not made in conformity with the order of authorization or approval."

VII.

3. The "call analysis" in this case is an after-the-fact non-validated presentation of counsel for the Government and does not and was not intended to establish that the monitoring agents complied with the minimization statute and order.

4. The admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order was unreasonable. Such conduct would be unreasonable even if every intercepted call were narcotic-related. The validity of a search is not to be determined by what is found. Byars v. United States, 273 U.S. 28, 29; United States v. Di Re, 332 U.S. 581. While the nature of the investigation may warrant closer listening than in some other type of case it does not warrant a total disregard of the statutory requirement and excuse the monitors from attempting to comply with the Statute and order of the Court. Failure to comply with the Statute and order of the Court renders any evidence obtained by such failure suppressible. Sabbath v. United States, 391 U.S. 585.

5. Inasmuch as the conduct of the monitoring agents was unreasonable the intercepted telephone communications, tape recordings, transcriptions and evidence obtained either directly or indirectly as a result of the intercept authorized by the Order of January 24, 1970, including communications between the Jenkins' telephone and the two Lee telephones and all surveillance and conduct emanating from said communications should be and they hereby are suppressed.

VIII.

Joseph C. Waddy

Joseph C. Waddy
United States District Judge

Date: November 12, 1974